

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 19-23649-rdd

4 - - - - - x

5 In the Matter of:

6

7 PURDUE PHARMA L.P.

8

9 Debtor.

10 - - - - - x

11 United States Bankruptcy Court

12 Tele/Video Proceedings

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 October 14, 2021

17 10:16 AM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: A. VARGAS

1 HEARING re Notice of Agenda / Agenda for October 14, 2021
2 Hearing and Pre-Hearing Conference

3
4 HEARING re Motion to File Proof of Claim after Claims Bar
5 Date filed by Emanuel Thirkill (ECF #3764)

6
7 HEARING re Motion to File Proof of Claim after Claims Bar
8 Date filed by Howard Adelglass (ECF #3840)

9
10 HEARING re Letter / Support for Debtor's Motion to File
11 Proof of Claim after Claims Bar Date (related document(s)
12 3840) filed by Howard Adelglass (ECF #3885)

13
14 HEARING re Objection /Debtors' Objection to Motion to File
15 Proof of Claim after Claims Bar Date (related document(s)
16 3885, 3840) filed by James I. McClammy on behalf of Purdue
17 Pharma L.P. (ECF #3911)

18
19 HEARING re Motion to Allow/Letter - Derivative and
20 Fraudulent Conveyance filed by Ronald Bass, Sr. (ECF #3619)

21
22 HEARING re Objection to Motion for the Joint Administration
23 of Claims of Ronald Bass, Sr. (related document(s) 3619
24 (filed by Valerie A. Hamilton on behalf of State of New
25 Jersey (ECF #3905)

1 HEARING re Objection / Debtors' Omnibus Objection to Ronald
2 Bass's Derivative and Fraudulent Conveyance Motion and
3 Supporting Letter (related document(s) 3619, 3721) filed by
4 James I. McClammy on behalf of Purdue Pharma L.P. (ECF
5 #3910)

6
7 HEARING re Related Document: Letter to Judge Drain in
8 support of the hearing for the month of October 2021 re:
9 claim 89590 (related document(s) 3619) filed by Ronald Bass,
10 Sr. (ECF #3721)

11
12 HEARING re Certification of Direct Appeal to Court of
13 Appeals/ United States Trustees Memorandum of Law in Support
14 of Motion to Certify Direct Appeal to the Court of Appeals
15 under 28 USC § 158(d) (related document(s) 3799, 3777) filed
16 by Linda Riffkin on behalf of United States Trustee (ECF
17 #3868)

18
19 HEARING re Responses Received: Opposition to Motions to
20 Certify Direct Appeals to the Second Circuit (related
21 document(s) 3686, 3874, 3871) filed by James P. Wehner, Jr.
22 on behalf of Multi-State Governmental Entities Group (ECF
23 #3932)

24
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1 HEARING re Objection/Debtors Omnibus Objection to Motions
2 for Certification of a Direct Appeal to the United States
3 Court of Appeals for the Second Circuit Pursuant to 28 USC
4 158(D) (related document(s) 3686, 3874, 3871, 3913) (ECF
5 #3933)

6
7 HEARING re Objection/Joinder of the Ad Hoc Group of
8 Individual Victims' to Debtors' Omnibus Objection to Motions
9 for Certification of a Direct Appeal to the United States
10 Court of Appeals for the Second Circuit Pursuant to 28 USC §
11 158(D) and Statement of Non-Consent to Certification
12 (related document(s) 3868, 3874, 3933, 3871, 3913) filed by
13 J. Christopher Shore on behalf of Ad Hoc Group of Individual
14 Victims of Purdue Pharma L.P. (ECF #3934)

15
16 HEARING re Opposition of the Official Committee of Unsecured
17 Creditors to Motions to Certify Direct Appeal (related
18 document(s) 3868, 3874, 3871, 3913) filed by Ira S.
19 Dizengoff on behalf of The Official Committee of Unsecured
20 Creditors of Purdue Pharma L.P., et al. (ECF #3935)

21
22 HEARING re Opposition to of The Official Committee of
23 Unsecured Creditors of Purdue Pharma L.P., et al. (ECF
24 #3935)

25

1 HEARING re Objection / Ad Hoc Committee's Omnibus Objection
2 to Motions for Certification Under 27 U.S.C. § 158(d)(2)(A)
3 (related document(s) 3868, 3874, 3871) filed by Kenneth H.
4 Eckstein on behalf of Ad Hoc Committee of Governmental and
5 Other Contingent Litigation Claimants. (ECF #3936)

6
7 HEARING re Related Documents: Motion to Shorten Time /
8 United States Trustee's Ex Parte Motion for an Order
9 Shortening Notice and Scheduling Hearing with Respect to the
10 United States Trustee's Motion to Certify Direct Appeal to
11 the Court of Appeals under 28 USC § 158(d) (related
12 document(s) 3868) filed by Linda Riffkin on behalf of United
13 States Trustee (ECF #3869)

14
15 HEARING re Notice of Hearing / Notice of Hearing on United
16 States Trustee's (1) Expedited Motion for an Order
17 Certifying Direct Appeal to the United States Court of
18 Appeals for the Second Circuit Under 28 USC § 158(D) and
19 (II) Motion for an Order Shortening Notice and Scheduling
20 Hearing with Respect to the United States Trustee's Motion
21 to Certify Direct Appeal to the Court of Appeals Under 28
22 USC § 158(d) (related document(s) 3868, 3869) filed by Linda
23 Riffkin on behalf of United States Trustee. (ECF #3870)

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25

1 HEARING re Notice of Hearing / Amended Notice of Hearing on
2 United States Trustees (I) Expedited Motion for an Order
3 Certifying Direct Appeal to the United States Court of
4 Appeals for the Second Circuit Under 28 USC 158(D) and (II)
5 Motion for an Order Shortening Notice and Scheduling Hearing
6 with Respect to the United States Trustees Motion to Certify
7 Direct Appeal to the Court of Appeals Under 28 USC 158(d)
8 (related document(s) 3870) (ECF #3875)

9
10 HEARING re Appealing States' Motion for Certification.
11 Certification of Direct Appeal to Court of Appeals the
12 Appealing States' Motion for Certification Pursuant to 28
13 USC § 158(d)(2) (A) filed by Matthew J. Gold on behalf of
14 State of Washington. (ECF #3871)

15
16 HEARING re Responses Received: Opposition to Motions to
17 Certify Direct Appeals to the Second Circuit (related
18 document(s) 3868, 3874, 3871) filed by James P. Wehner Jr. on
19 behalf of Multi-State Governmental Entities Group. (ECF
20 #3932)

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1 HEARING re Objection / Debtors Omnibus Objection to Motions
2 for Certification of a Direct Appeal to the United States
3 Court of Appeals for the Second Circuit Pursuant to 28
4 U.S.C. 158(D) (related document(s) 3686, 3874, 3871,
5 3913) (ECF #3933)

6
7 HEARING re Objection / Joinder of the Ad Hoc Group of
8 individual Victims' to Debtors' Omnibus Objection to Motions
9 for Certification of a Direct Appeal to the United States
10 Court of Appeals for the Second Circuit Pursuant to 28
11 U.S.C. § 158(0) and Statement of Non-Consent to
12 Certification (related document(s) 3868, 3874, 3933, 3871,
13 3913) filed by J. Christopher Shore on behalf of Ad Hoc
14 Group of Individual Victims of Purdue Pharma L.P. (ECF
15 #3934)

16
17 HEARING re Opposition of the Official Committee of Unsecured
18 Creditors to Motions to Certify Direct Appeal (related
19 document(s) 3868, 3874, 3871, 3913) filed by Ira S. Dizengoff
20 on behalf of The Official Committee of Unsecured Creditors
21 of Purdue Pharma L.P., et al. (ECF #3935)

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1 HEARING re Objection / Ad Hoc Committee's Omnibus Objection
2 to Motions for Certification Under 27 U.S.C. § 158(d)(2)(A)
3 (related document(s) 3868, 3874, 3871) filed by Kenneth H.
4 Eckstein on behalf of Ad Hoc Committee of Governmental and
5 Other Contingent Litigation Claimants. (ECF #3936)

6
7 HEARING re Motion to Shorten Time - The State of
8 Washington's Ex Parte Motion for an Order Shortening Notice
9 and Scheduling Hearing with Respect to the Appealing States'
10 Motion for Certification Pursuant to 28 U.S.C. §
11 158(d)(2)(A) filed by Matthew J. Gold on behalf of State of
12 Washington. (ECF #3872)

13
14 HEARING re Amended Notice of Hearing on (I) Appealing
15 States' Motion for Certification Pursuant to 28 U.S.C. §
16 158(d)(2)(A) and (II) The State of Washington's Ex Parte
17 Motion for an Order Shortening Notice and Scheduling Hearing
18 with Respect to The Appealing States' Motion for
19 Certification Pursuant to 28 U.S.C. § 158(d)(2)(A) filed by
20 Matthew J. Gold on behalf of State of Washington. (ECF
21 #3881)

1 HEARING re State of California Direct Appeal and Joinder.
2 Certification of Direct Appeal to Court of Appeals and
3 Joinder to the Appealing States' Motion for Certification
4 Under 28 U.S.C. § 158(d)(2)(A) filed by Bernard Ardavan
5 Eskandari on behalf of The People of the State of
6 California. (ECF #3874)

7
8 HEARING re Responses Received: Opposition to Motions to
9 Certify Direct Appeals to the Second Circuit (related
10 document(s) 3868, 3874, 3871) filed by James P. Wehner Jr. on
11 behalf of Multi-State Governmental Entities Group. (ECF
12 #3932)

13
14 HEARING re Objection / Debtors Omnibus Objection to Motions
15 for Certification of a Direct Appeal to the United States
16 Court of Appeals for the Second Circuit Pursuant to 28
17 U.S.C. 158(0) (related document(s) 3686, 3874, 3871,
18 3913) (ECF #3933)

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1 HEARING re Objection/ Joinder of the Ad Hoc Group of
2 Individual Victims' to Debtors' Omnibus Objection to Motions
3 for Certification of a Direct Appeal to the United States
4 Court of Appeals for the Second Circuit Pursuant to 28
5 U.S.C. § 158(D) and Statement of Non-Consent to
6 Certification (related document(s) 3868, 3874, 3933, 3871,
7 3913) filed by J. Christopher Shore on behalf of Ad Hoc
8 Group of Individual Victims of Purdue Pharma L.P. (ECF
9 #3934)

10
11 HEARING re Opposition of the Official Committee of Unsecured
12 Creditors to Motions to Certify Direct Appeal (related
13 document(s) 3868, 3874, 3871, 3913) filed by Ira S.
14 Dizengoff on behalf of The Official Committee of Unsecured
15 Creditors of Purdue Pharma L.P., et al. (ECF #3935)

16
17 HEARING re Objection / Ad Hoc Committee's Omnibus Objection
18 to Motions for Certification Under 27 U.S.C. § 158(d)(2)(A)
19 (related document(s) 3868, 3874, 3871) filed by Kenneth H.
20 Eckstein on behalf of Ad Hoc Committee of Governmental and
21 Other Contingent Litigation Claimants. (ECF #3936)

1 HEARING re Statement and Joinder of Certain Canadian
2 Municipality and First Nations Creditors and Appellants, In
3 Support of the Motions by the Office of the United States
4 Trustee and the Appealing States for Certification of a
5 Consolidated and Expedited Direct Appeal to the Court of
6 Appeals for the Second Circuit (related document(s) 3868,
7 3874, 3871) filed by Allen J. Underwood on behalf of Certain
8 Canadian Municipality Creditors and Canadian First Nation
9 Creditors. (ECF #3913)

10
11 HEARING re Responses Received: Opposition to Motions to
12 Certify Direct Appeals to the Second Circuit (related
13 document(s) 3868, 3874, 3871) filed by James P. Wehner Jr.
14 on behalf of Multi-State Governmental Entities Group. (ECF
15 #3932)

16
17 HEARING re Objection / Debtors Omnibus Objection to Motions
18 for Certification of a Direct Appeal to the United States
19 Court of Appeals for the Second Circuit Pursuant to 28
20 U.S.C. 158(0) (related document(s) 3686, 3874, 3871,
21 3913) (ECF #3933)

1 HEARING re Objection / Joinder of the Ad Hoc Group of
2 Individual Victims' to Debtors' Omnibus Objection to Motions
3 for Certification of a Direct Appeal to the United States
4 Court of Appeals for the Second Circuit Pursuant to 28
5 U.S.C. § 158(D) and Statement of Non-Consent to
6 Certification (related document(s) 3868, 3874, 3933, 3871,
7 3913) filed by J. Christopher Shore on behalf of Ad Hoc
8 Group of Individual Victims of Purdue Pharma L.P. (ECF
9 #3934)

10
11 HEARING re Opposition of the Official Committee of Unsecured
12 Creditors to Motions to Certify Direct Appeal (related
13 document(s) 3868, 3874, 3871, 3913) filed by Ira S.
14 Dizengoff on behalf of The Official Committee of Unsecured
15 Creditors of Purdue Pharma L.P., et al. (ECF #3935)

16
17 HEARING re Objection / Ad Hoc Committee's Omnibus Objection
18 to Motions for Certification Under 27 U.S.C. § 158(d)(2)(A)
19 (related document(s) 3868, 3874, 3871) filed by Kenneth H.
20 Eckstein on behalf of Ad Hoc Committee of Governmental and
21 Other Contingent Litigation Claimants. (ECF #3936)

1 HEARING re United States Trustee's Motion for Stay Pending
2 Appeal / Memorandum of Law in Support of United States
3 Trustees Expedited Motion for A Stay Of Confirmation Order
4 And Related Orders Pending Appeal Pursuant To Federal Rule
5 Of Bankruptcy Procedure 8007 (related document(s) 3777, 3776)
6 filed by Linda Riffkin on behalf of United States Trustee.
7 (ECF #3778)

8
9 HEARING re Related Documents: Order signed on 9/15/2021
10 Granting Motion (I) Authorizing the Debtors to Fund
11 Establishment of the Creditor Trusts, the Master
12 Disbursement Trust and Topco, (II) Directing Prime Clerk LLC
13 to Release Certain Protected Information, and (ill) Granting
14 Other Related Relief (Related Doc # 3484) (ECF #3773)

15
16 HEARING re Motion for Stay Pending Appeal / Memorandum of
17 Law in Support of United States Trustees Expedited Motion
18 for A Stay of Confirmation Order and Related Orders Pending
19 Appeal Pursuant to Federal Rule of Bankruptcy Procedure 8007
20 (related document(s) 3777, 3776) filed by Linda Riffkin on
21 behalf of United States Trustee. (ECF #3778)

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1 HEARING re Motion to Shorten Time United States Trustees Ex
2 Parte Motion for An Order Shortening Notice and Scheduling
3 Hearing with Respect to The United States Trustees Expedited
4 Motion for A Stay Of Confirmation Order And Related Orders
5 Pending Appeal Pursuant To Federal Rule Of Bankruptcy
6 Procedure 8007 (related document(s) 3778) filed by Linda
7 Riffkin on behalf of United States Trustee. (ECF #3779)
8
9 HEARING re Modified Bench Ruling on For Confirmation of
10 Eleventh Amended Joint Chapter 11 Plan Signed on 9/17/2021.
11 (ECF #3786)
12
13 HEARING re Findings of Fact, Conclusions of Law, And Order
14 Confirming the Twelfth Amended Joint Chapter 11 Plan of
15 Reorganization Of Purdue Pharma L.P. and its Affiliated
16 Debtors Signed On 9/17/2021 (related document(s) 3726). (ECF
17 #3787)
18
19 HEARING re Amended Motion for Stay Pending Appeal / Amended
20 Memorandum of Law in Support of United States Trustee's
21 Expedited Motion for A Stay Of Confirmation Order And
22 Related Orders Pending Appeal Pursuant To Federal Rule Of
23 Bankruptcy Procedure 8007 (related document(s) 3799, 3777,
24 3776, 3778, 3779) filed by Linda Riffkin on behalf of United
25 States Trustee. (ECF #3801)

1 HEARING re Motion to Stay / Memorandum of Law in Support of
2 United States Trustee's Expedited Motion to Extend the
3 Automatic Stay of the Confirmation Order and for a Limited
4 Stay of the Related Orders Pending Resolution of His
5 Expedited Motion for a Stay Pending Appeal (related
6 document(s) 3786, 3787, 3773) filed by Linda Riffkin on
7 behalf of United States Trustee. (ECF #3803)

8
9 HEARING re Motion to Shorten Time / United States Trustees
10 Ex Parte Motion for an Order Shortening Notice and
11 Scheduling Hearing with Respect to the United States
12 Trustee's Expedited Motion to Extend the Automatic Stay of
13 the Confirmation Order and for a Limited Stay of the Related
14 Orders Pending Resolution of His Expedited Motion for a Stay
15 Pending Appeal (related document(s) 3803) filed by Linda
16 Riffkin on behalf of United States Trustee. (ECF #3804)

17
18 HEARING re Statement / Notice of Listen-Only Dial-in for
19 Status and Scheduling Conference (related document(s) 3779)
20 filed by Eli J. Vonnegut on behalf of Purdue Pharma L.P.
21 (ECF #3838)

22
23 HEARING re Washington and Connecticut States Stay Motion.
24 Motion for Stay Pending Appeal (related document(s) 3786,
25 3787, 3773) filed by Matthew J. Gold on behalf of State of

1 Washington. (ECF #3789)
2
3 HEARING re Related Documents: Modified Bench Ruling On For
4 Confirmation Of Eleventh Amended Joint Chapter 11 Plan
5 Signed on 9/17/2021. (ECF #3786)
6 HEARING re Findings of Fact, Conclusions of Law, And Order
7 Confirming The Twelfth Amended Joint Chapter 11 Plan Of
8 Reorganization Of Purdue Pharma L.P. And Its Affiliated
9 Debtors Signed On 9/17/2021 (related document(s)3726). (ECF
10 #3787)
11
12 HEARING re Motion for Stay Pending Appeal of Confirmation
13 and Trust Advances Orders filed by Brian Edmunds on behalf
14 of State of Maryland. (ECF #3845)
15
16 HEARING re Related Documents: Order signed on 9/15/2021
17 Granting Motion (I) Authorizing the Debtors to Fund
18 Establishment of the Creditor Trusts, the Master
19 Disbursement Trust and Topco, (II) Directing Prime Clerk LLC
20 to Release Certain Protected Information, and (III) Granting
21 Other Related Relief (Related Doc# 3484). (ECF #3773)
22
23 HEARING re Modified Bench Ruling on For Confirmation Of
24 Eleventh Amended Joint Chapter 11 Plan Signed on
25 9/17/2021. (ECF #3786)

1 HEARING re Findings of Fact, Conclusions Of Law, And Order
2 Confirming The Twelfth Amended Joint Chapter 11 Plan Of
3 Reorganization Of Purdue Pharma L.P. And Its Affiliated
4 Debtors Signed On 9/17/2021 (related document(s)3726). (ECF
5 #3787)

6
7 HEARING re Motion for Stay Pending Appeal (related
8 document(s)3810, 3847) filed by Ronald Bass Sr. (ECF #3860)

9
10 HEARING re Related Documents: Order signed on 9/15/2021
11 Granting Motion (I) Authorizing the Debtors to Fund
12 Establishment of the Creditor Trusts, the Master
13 Disbursement Trust and Topco, (II) Directing Prime Clerk LLC
14 to Release Certain Protected Information, and (III) Granting
15 Other Related Relief (Related Doc# 3484). (ECF #3773)

16
17 HEARING re Modified Bench Ruling on For Confirmation Of
18 Eleventh Amended Joint Chapter 11 Plan Signed on
19 9/17/2021. (ECF #3786)

20
21 HEARING re Findings of Fact, Conclusions of Law, and Order
22 Confirming the Twelfth Amended Joint Chapter 11 Plan of
23 Reorganization of Purdue Pharma L.P. and Its Affiliated
24 Debtors Signed On 9/17/2021 (related document(s)3726). (ECF
25 #3787)

1 HEARING re Motion for Stay Pending Appeal filed by Allen J.
2 Underwood on behalf of Certain Canadian Municipality
3 Creditors and Canadian First Nation Creditors (ECF #3873)
4 HEARING re Related Documents: Order signed on 9/15/2021
5 Granting Motion (I) Authorizing the Debtors to Fund
6 Establishment of the Creditor Trusts, the Master
7 Disbursement Trust and Topco, (II) Directing Prime Clerk LLC
8 to Release Certain Protected Information, and (III) Granting
9 Other Related Relief (Related Doc# 3484). (ECF #3773)
10
11 HEARING re Modified Bench Ruling on For Confirmation of
12 Eleventh Amended Joint Chapter 11 Plan Signed on
13 9/17/2021. (ECF #3786)
14 HEARING re Findings of Fact, Conclusions of Law, and Order
15 Confirming the Twelfth Amended Joint Chapter 11 Plan of
16 Reorganization of Purdue Pharma L.P. and Its Affiliated
17 Debtors Signed On 9/17/2021 (related document(s) 3726). (ECF
18 #3787)
19
20 HEARING re Motion for Stay Pending Appeal filed by Ellen
21 Isaacs (ECF #3890)
22
23
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1 HEARING re Related Documents: Order signed on 9/15/2021
2 Granting Motion (I) Authorizing the Debtors to Fund
3 Establishment of the Creditor Trusts, the Master
4 Disbursement Trust and Topco, (II) Directing Prime Clerk LLC
5 to Release Certain Protected Information, and (III) Granting
6 Other Related Relief (Related Doc# 3484). (ECF #3773)

7
8 HEARING re Modified Bench Ruling on For Confirmation of
9 Eleventh Amended Joint Chapter 11 Plan Signed on
10 9/17/2021. (ECF #3786)

11
12 HEARING re Findings Of Fact, Conclusions Of Law, And Order
13 Confirming The Twelfth Amended Joint Chapter 11 Plan Of
14 Reorganization Of Purdue Pharma L.P. And Its Affiliated
15 Debtors Signed On 9/17/2021 (related document(s) 3726). (ECF
16 #3787)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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6 BY: J. CHRISTOPHER SHORE (TELEPHONICALLY)

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8 ALSO PRESENT TELEPHONICALLY:

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10 RONALD BASS, SR., Pro Se

11 ELLEN ISAACS, Pro Se

12 AMANDA MORALES, Pro Se

13 JILL S ABRAMS

14 ROXANA ALEALI

15 ANNE ANDREWS

16 MICHAEL ATKINSON

17 JASMINE BALL

18 BROOKS BARKER

19 KATHRYN BENEDICT

20 SARA BRAUNER

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6 LAURA FEMINO
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11 ELISA HYDER
12 HAROLD D. ISRAEL
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15 MARC KESSELMAN
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18 ALEXANDER LEES
19 BETH ANN LEVENE
20 MARA LEVENTHAL
21 KEVIN MACLAY
22 BRIAN S. MASUMOTO
23 PATRICK C. MAXCY
24 SHANNON M MCNULTY
25 MICHELE MEISES

1 NATHANIEL MILLER
2 MAURA KATHLEEN MONAGHAN
3 MICHAEL PATRICK O'NEIL
4 THOMAS ROBINSON O'NEILL
5 RACHEL R OBALDO
6 SUSAN OUSTERMAN
7 KATHERINE PORTER
8 MICHELE PUIGGARI
9 LINDA RIFFKIN
10 RACHAEL RINGER
11 CHRISTOPHER ROBERTSON
12 JEFFREY J. ROSEN
13 ELIZABETH SCHLECKER
14 PAUL KENAN SCHWARTZBERG
15 LUCAS H SELF
16 J. CHRISTOPHER SHORE
17 MARC F. SKAPOF
18 D. RYAN R SLAUGH
19 KATE SOMERS
20 CLAUDIA Z. SPRINGER
21 ERIC STODOLA
22 ANDREW M. TROOP
23 ALICE TSIER
24 GERARD UZZI
25 MELISSA L. VAN ECK

1 ANDREW D. VELEZ-RIVERA
2 ELI J. VONNEGUT
3 ALLISON H. WEISS
4 THEODORE WELLS
5 LAUREN S. ZABEL
6 JAMIE ZEEVI
7 VINCE SULLIVAN
8 NADINE A ALBENZE-SMITH
9 JOSEPH BRANDT
10 ROBERT G. BURNS
11 TZERINA DIZON
12 MATTHEW FITZSIMMONS
13 CAROLINE GANGE
14 UDAY GORREPATI
15 TAYLOR HARRISON
16 JEREMY C. HILL
17 DIETRICH KNAUTH
18 ANN KRAMER
19 M. NATASHA LABOVITZ
20 NICOLE A LEONARD
21 KAREN LEUNG
22 SIDNEY P. LEVINSON
23 THOMAS MAHLUM
24 NICHOLAS PREY
25 EVAN ROMANOFF

1 JOSEPH A. SHIFER
2 RICHARD SHORE
3 SARAH SRADERS
4 JACOB W. STAHL
5 MAHALAXMI SUBRAMANIAN
6 VINCE SULLIVAN
7 WENDY WEINBERG
8 ANNIE WELLS
9 KATIE M WHITE
10 MARY JO WHITE
11 HAROLD WILLIFORD

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1 P R O C E E D I N G S

2 THE COURT: All right, good morning. This is
3 Judge Drain. We are here in In re Purdue Pharma L.P., et al
4 for the October Omnibus hearing. I have the agenda for this
5 hearing, and I am happy to go down it in order.

6 I will note that I'm a little late getting on the
7 bench because I have received and reviewed District Judge
8 McMahon's memorandum and order denying without prejudice the
9 United States Trustee's emergency motion for a stay pending
10 appeal. The agenda includes at the end of the calendar a
11 pre-hearing conference on this Court's determination of the
12 U.S. Trustee's motion for a stay pending appeal and other
13 similar motions.

14 So, again, I'm going to go down the agenda in the
15 order of the agenda. And the first matter on the calendar
16 is a motion -- I'm deeming it a motion as the Debtor's did
17 by filing a notice, and a notice of opposed order resolving
18 it, of Emanuel Thirkill. Is Mr. Thirkill on the phone? No.
19 All right.

20 I don't know who is handling this from the
21 Debtor's side.

22 MR. HUEBNER: Your Honor, good morning. For the
23 record, Marshall Huebner of Davis Polk. I believe that the
24 first matter is being held by Ms. Esther Townes.

25 THE COURT: Okay.

1 MR. HUEBNER: I'll turn the podium over to her.

2 THE COURT: I see Ms. Townes on the screen.

3 MS. TOWNES: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MS. TOWNES: For the record, this is Esther Townes
6 with Davis Polk & Wardwell on behalf of the Debtor. Can you
7 hear me clearly?

8 THE COURT: Yes, I can. Thanks.

9 MS. TOWNES: So Mr. Thirkill's late claim motion
10 is at Docket Number 3764. And based on (indiscernible) Mr.
11 Thirkill's motion, the Debtor (indiscernible) granting his
12 request (indiscernible) Pioneer factors. In addition, the
13 Debtor has consulted with the UCC and the Ad Hoc Group
14 (indiscernible) individual victims regarding
15 (indiscernible).

16 So on that basis, the Debtors (indiscernible) at
17 Docket Number 3901. And that (indiscernible).

18 THE COURT: Okay. You were cutting in and out a
19 little bit, Ms. Townes. But I think the record is clear
20 that the Debtors consent to the motion for relief to file a
21 late claim under Bankruptcy Rule 9006 and the case law
22 interpreting it. And, in fact, the Debtors then provided
23 notice of their proposed order on October 6th, which would
24 grant the motion without prejudice of course to any party's
25 rights with regard to the underlying merits of the claim.

1 That notice is unopposed, and the Debtors have also
2 represented that the Official Unsecured Creditors' Committee
3 does not oppose the granting of the motion. Does anyone
4 else have anything to say on this motion? Okay.

5 I will grant the motion. The standard to permit a
6 late claim to be filed under Bankruptcy Rule 9006 and the
7 case law interpreting it, including Pioneer Investment
8 Services Company v. Brunswick Associates Limited
9 Partnership, 507 U.S. 380, 395 (1993) and In re Enron Corp.,
10 419 F.3d 115, 122 (2d Cir. 2005) is a fairly exacting one,
11 particularly with regard to Circuit has described as the
12 most important factor to consider, which is whether the
13 filing of the late claim in a timely manner was within the
14 reasonable control of the movant, i.e. the excuse for the
15 late filing.

16 The scrutiny paid to request to file late claims
17 is heightened when there has been a lengthy delay between
18 the bar date and the request to file a late claim and also
19 where a plan in reliance on in part the claims that were
20 timely filed has been negotiated and confirmed. Both of
21 those facts apply here, as does the fact that there was
22 substantially extended notice of the bar date, particularly
23 for personal injury claims.

24 Nevertheless, Mr. Thirkill asserts that he was
25 subject to COVID-19 restrictions as well as confinement.

1 And I think the Debtors could reasonably infer because of
2 that, his filing a late claim was outside of his reasonable
3 control.

4 In any event, the focus will be on the merits of
5 the claim, which is fully preserved and not on this issue,
6 which would have cost a fair amount of money to resolve as
7 far as whether it was within or not within his control.

8 So you can email the order granting the motion and
9 reserving all other rights to chambers and it will be
10 entered.

11 MS. TOWNES: Will do, Your Honor. Thank you.

12 THE COURT: Okay. The next matter on the calendar
13 is a motion that actually does not seek specifically leave
14 to file a late claim under Bankruptcy Rule 9006 and Pioneer
15 and Enron but has been taken by the Court to seek that
16 relief given that the movant, Howard Adelglass, has not
17 filed a timely claim. And in a letter to the Court dated
18 September 23, 2021 seeks to have a claim considered against
19 the Debtors.

20 So I see Mr. Adelglass on the screen. This motion
21 was objected to by the Debtors. I have reviewed it. But,
22 Mr. Adelglass, I don't know if you have anything more to say
23 on the request to file the claim late.

24 MR. ADELGLASS: Well, I am a doctor, and I was
25 targeted by Purdue. And I didn't find out about McKinsey's

1 involvement with Purdue until a few weeks ago. And
2 basically because of my targeting by Purdue, it caused me --
3 I write opioids. I am a doctor. I bought all their
4 propaganda. And then I was arrested for doing my job and
5 writing prescriptions for patients that lost their doctors.
6 A number of patients lost their doctors because they were
7 arrested. And when I took them on, I got arrested. And so
8 I basically -- my life is over because of this whole thing.

9 THE COURT: When did that happen, Dr. Adelglass?
10 When were you arrested?

11 MR. ADELGLASS: November 18th.

12 THE COURT: Of this year?

13 MR. ADELGLASS: Yes.

14 THE COURT: Well, because your letter is dated
15 September 23, 2021.

16 MR. ADELGLASS: Right. Basically I didn't
17 understand how McKinsey was involved with this. And when I
18 read the article in Times that they admitted that they
19 helped Purdue target doctors by basically propaganda and
20 making the doctors give more -- write more prescriptions to
21 Purdue and make Purdue more profitable. I only found that
22 out about a month ago.

23 THE COURT: When did you first understand that you
24 were under investigation?

25 MR. ADELGLASS: I basically -- in 2018 they took

1 my files from my office. But when I spoke to my attorneys
2 at that time, they said I'm just a person of interest and
3 I'm not under -- there is no investigation started. That's
4 what I was told. And then one day I woke up and the police
5 were in my -- the FBI, DA, everyone was in my apartment.

6 THE COURT: Okay. All right. Do you have
7 anything more to say on the motion?

8 MR. ADELGLASS: Just that, you know, the
9 oxycontin, the labeling that says it's not addictive, all
10 the propaganda used to make me want to prescribe this. And
11 the other doctors are in the same situation as me. I
12 basically took on a number of patients that were on high
13 dose opioids when their doctors were arrested, and they were
14 going into withdrawal and suffering. I took them on, and
15 then I got arrested.

16 THE COURT: And when did you take them on?

17 MR. ADELGLASS: 2018, right before I was -- right
18 before they came to my office and took my files.

19 THE COURT: Okay, all right. Very well. All
20 right.

21 I have reviewed the Debtor's objection as well,
22 but I'm happy to hear from the Debtor's counsel on this.

23 MR. MCCLAMMY: All right. Good morning, Your
24 Honor. Jim McClammy of Davis Polk & Wardwell on behalf of
25 the Debtors. Am I being able to be heard okay?

1 THE COURT: Yes.

2 MR. MCCLAMMY: Thank you. Your Honor, we do stand
3 on our papers. I will not respond to the statement of the
4 history of how things transpired that Dr. Adelglass has set
5 up here. I think the record of these cases is clear as to
6 the Debtor's position with respect to how we are going about
7 addressing the merits of claims such as those.

8 I will say, however, that this presentation and
9 this motion, to the extent it can be construed as a motion,
10 is very different from the others that we've seen. It
11 appears to us, having heard argument today, that the
12 allegations do relate back to a pre-petition hearing, that
13 Dr. Adelglass was well aware of his connections with Purdue
14 and, you know, potential claims against Purdue.

15 As Your Honor has noted, the notice of the
16 pendency of these cases and the bar date has been extensive
17 and perhaps even unprecedented. And we do not see any basis
18 set out in either the motion papers or the presentation
19 today to argue for excusable neglect or delay here. And the
20 prejudice we think would be immense in these cases if we
21 were to start to open the floodgates to prescribers just
22 coming out now and, you know, without any explanation of the
23 reasons for the delay.

24 So for the reasons set forth in the papers and
25 just now, we would respectfully request that this motion be

1 denied.

2 THE COURT: Okay. Does anyone else have anything
3 to say on the motion? All right.

4 I have before me what I deem to be a motion. It's
5 dated September 23, 2021. I will note that it was preceded
6 by a September 2, 2021 letter to the Court that really did
7 not seek any specific relief. We got this letter on or
8 around the 23rd. It also does not seek any specific relief
9 other than recognition of the claim that is asserted in it,
10 which is for millions of dollars, \$2.5 million in
11 compensation. The bar date in this case was several months
12 ago for filing proofs of claim.

13 Nevertheless, the bankruptcy rules and Rule 9006
14 permit a claim to be filed late on the basis of excusable
15 neglect. That requires a two-step analysis, i.e. first,
16 whether there was neglect caused by inadvertence, mistake,
17 or carelessness, or by intervening circumstances beyond the
18 parties' control as opposed to an intentional act. And then
19 second, that the neglect was excusable. See *In re DPH*
20 *Holdings Corp.*, 434 B.R. 77, 82 (S.D.N.Y. 2010).

21 The Supreme Court interpreted such a request in
22 *Pioneer Investment Services Company v. Brunswick Associates*
23 *Limited Partnership*, 507 U.S. 380 (1993) and there noted
24 that the determination of excusable neglect is an equitable
25 one considering all the circumstances, including "One, the

1 danger of prejudice to the Debtor; two, the length of the
2 delay and its potential impact on judicial proceedings;
3 three, the reason for the delay, including whether it was
4 within the reasonable control of the movant; and four,
5 whether the movant acted in good faith," id at 395.

6 The Second Circuit in applying that test has noted
7 that it takes a hard line with respect to the test because
8 the equities will rarely if ever favor a party who fails to
9 follow the clear dictates of a court rule, or in this case,
10 a court order setting a time limit. And that's where the
11 rule is entirely clear. Courts expect that a party claiming
12 excusable neglect will in the ordinary course lose under the
13 Pioneer test, In re Enron Corp., 419 F.3d 115, 122-23 (2d.
14 Cir. 2005). That occurs based on the most important factor
15 where no excuse for the claim being filed late or an
16 unreasonable excuse for the claim being filed late is
17 asserted. The other factors in the Second Circuit listed in
18 the Pioneer case generally then apply where there are closed
19 questions.

20 The movant has the burden of proving excusable
21 neglect, id at 121 quoting Jones v. Chemetron Corp., 212
22 F.3d 199, (3d Cir. 2000). Here, the letter itself stated no
23 basis for why the claim was filed several months late, and
24 it appears to me based on the movant's statements at oral
25 argument that he was aware or reasonably aware of the

1 alleged basis for his claim as far back as 2018. Even his
2 acknowledgment that he was under investigation at least at
3 that time for the improper prescription of oxycontin and
4 that he had taken over, according to him, patients who had
5 previously been treated by doctors who were either under
6 investigation or themselves had been arrested for the
7 improper prescription of oxycontin, which to my mind would
8 have put him on notice as to his current theory that he was
9 misled by the Debtors to prescribe the drug.

10 So the primary factor not being established under
11 the Pioneer test, namely whether the delay had some form or
12 excuse or not, that would be sufficient to deny the motion
13 here.

14 In addition, however, there have been several
15 months since the bar date was established. It was a lengthy
16 bar date. And since the bar date was established, the Court
17 has confirmed the Debtor's Chapter 11 plan, which is
18 premised upon complex interlocking settlements among
19 different types of claimants, including personal injury
20 claimants, hospitals, and governmental entities, among
21 others, that allocate the Debtor's value among those
22 different groups of claimants. To open the door at this
23 point to this type of claim would be prejudicial not only to
24 the Debtors, but also to those parties who negotiated that
25 plan.

1 So that factor as well applies, as does the length
2 of delay. The factor being prejudice, as well as the length
3 of delay, in addition to whether the filing of the claim
4 late was within the reasonable control of the movant. So I
5 will deny the motion for those reasons.

6 The Debtor should email an order consistent with
7 that ruling to chambers.

8 MR. MCCLAMMY: Thank you, Your Honor. We will do
9 that.

10 THE COURT: Okay, thank you.

11 MR. ADELGLASS: Judge, Judge, can I talk?

12 THE COURT: No. I have ruled, sir.

13 MR. ADELGLASS: Okay.

14 THE COURT: The next matter on the calendar is
15 another pro se matter by Ronald Bass, a motion by Mr. Bass
16 in which he seeks to join as a necessary party various
17 parties involved in litigation in New Jersey state court
18 that he has brought against the State of New Jersey,
19 Department of Treasury, Gerold Christopher, the chief of New
20 Jersey Bureau of Securities, the State of New Jersey's
21 Attorney General's Office, retirement pension plans, all
22 public entities, employees, and private entities of the
23 State of New Jersey, and others, including other parties
24 besides certain of the debtors who are either manufacturers
25 or distributors of opioid drugs.

1 The motion also seeks -- I'll just read it. "An
2 order for the United States Trustee, Division of the U.S.
3 Department of Justice, to file derivative claims to protect
4 my claims against fraudulent conveyance," and apparently
5 also a -- either underneath that heading or under a separate
6 heading, a request to avoid and stop payouts under the plan
7 to the State of New Jersey, et al.

8 The motion has been objected to by the State of
9 New Jersey as well as the Debtors. I have reviewed the
10 pleadings on this, but I am happy to hear a brief oral
11 argument.

12 MR. BASS: Your Honor, this is Ronald
13 (indiscernible).

14 THE COURT: I cannot hear you clearly. Can you
15 get closer to your receiver or your microphone.

16 MR. BASS: Yes. I am here. Can you hear me now?

17 THE COURT: Yes.

18 MR. BASS: Yes. This is Ronald Bass. Also, this
19 is consistent with my tagalong claim I filed with the United
20 States Judicial Panel who (indiscernible) that I should try
21 to reach alternatives in the bankruptcy court --

22 THE COURT: You mean in the multidistrict
23 litigation in Ohio?

24 MR. BASS: I did a tag along with this claim also
25 and I stated that.

1 THE COURT: Right.

2 MR. BASS: And they stated that (indiscernible)
3 says that the (indiscernible) alternative transfer to a
4 minimum whatever if any (indiscernible).

5 THE COURT: I'm sorry, sir. You're fading in and
6 out, and I'm just having a hard time hearing you. Are you
7 on the phone?

8 MR. BASS: Yes. I sent the -- yes, I am on the
9 phone. Can you hear me?

10 THE COURT: Yes. But you're going to have to --

11 MR. BASS: I'm on the phone.

12 THE COURT: I hate to say this, but you're going
13 to have to stay close to the receiver so that you don't fade
14 in and out.

15 MR. BASS: Okay. But I sent a copy of the order
16 from the judicial panel, the multidistrict litigation panel.
17 I sent you a copy of that, a courtesy copy, as well as one
18 for the clerk. And they made reference that after you
19 (indiscernible) should be referred to. Although the state
20 denied it, but I am appealing it to the district court.

21 What was your finding?

22 THE COURT: I'm sorry?

23 MR. BASS: I said did you -- what was your
24 findings in --

25 THE COURT: Well, I haven't ruled yet. I am

1 waiting to hear from the parties. I've read the pleadings.
2 And you are correct, you have also sought to have your
3 action included in the multidistrict litigation pertaining
4 to opioids that's pending in the district court in Ohio,
5 although I understand that that was turned down. But --

6 MR. BASS: They denied it.

7 THE COURT: And I also understand that you and a
8 family member have filed a proof of claim in these
9 bankruptcy cases against these debtors.

10 MR. BASS: Right. And also (indiscernible).

11 THE COURT: Right. Okay.

12 MR. BASS: Right. So --

13 THE COURT: But that is not before me, sir. This
14 is not -- my case is not a multidistrict case and it's not
15 governed by the rules that pertain to multidistrict
16 litigation.

17 MR. BASS: Okay. But back to the (indiscernible)
18 the state (indiscernible) the government (indiscernible).

19 THE COURT: You know, sir, it's just -- I
20 apologize. I have your pleading. I just can hear every
21 other word. It's not going to come through with the court
22 reporter.

23 I don't know if either the State of New Jersey or
24 the Debtors have anything to add to their pleadings.
25 Otherwise, I am prepared to give my ruling based on the

1 pleadings before me.

2 MS. HAMILTON: Your Honor, we'll stand on our
3 pleadings.

4 THE COURT: Could you just state your name for the
5 record, ma'am?

6 MS. HAMILTON: Valerie Hamilton on behalf of the
7 State of New Jersey.

8 THE COURT: Okay.

9 MR. MCCLAMMY: And Jim McClammy, Davis Polk, on
10 behalf of the Debtors. We will also stand on our pleadings,
11 Your Honor.

12 THE COURT: Okay. All right. I will give my
13 ruling, then.

14 Mr. Bass, as I noted, seeks two forms of relief,
15 one of which may be in two parts. The first is that these
16 Chapter 11 cases involving the Purdue debtors and the other
17 defendants in his pending litigation in the Superior Court
18 of New Jersey, Essex County, be jointly administered. In
19 essence I gather taken away from the administration by the
20 New Jersey court. And as far as the claims asserted to the
21 New Jersey court against the non-debtor entities, most of
22 which are officials of the state of New Jersey, but in
23 addition include other defendants engaged in the production
24 or distribution of opioid products.

25 That litigation has proceeded for some time

1 independently of these bankruptcy cases and has resulted in
2 the grant of two motions to dismiss the original complaint
3 and the amended complaint, although they were without
4 prejudice. And as I understand it, a further amended
5 complaint has been filed in that litigation.

6 The rubric under which Mr. Bass seeks this relief
7 is Bankruptcy Rule 7019, which provides that Federal Rule of
8 Civil Procedure 19 applies in adversary proceedings except
9 that if an entity joined as a party raises the defense that
10 the Court lacks jurisdiction over the subject matter of the
11 defense is sustained, the Court shall dismiss such entity
12 from the adversary proceedings. Rule 19 of the Federal
13 Rules of Civil Procedure sets forth when a party is required
14 to be joined to a civil action.

15 The objections to the applicability of Bankruptcy
16 Rule 7019 here are twofold. First, they assert that Rule
17 7019 does not apply because these cases and Mr. Bass' claims
18 in these cases, and he filed proofs of claim timely, are not
19 adversary proceedings as specified in the rule.

20 Bankruptcy Rule 9014(c), which incorporates
21 specific Part 7 rules of the Bankruptcy Rules, does not
22 incorporate Rule 7019, leaving it up to the court whether it
23 wishes to do so in the particular facts and circumstances.

24 Secondly, the objections contend, as recognized by
25 Rule 7019 they can, that the court lacks subject matter

1 jurisdiction over the causes of action asserted in the New
2 Jersey court complaint against the non-debtor parties. And
3 of course the causes of action against the debtor parties
4 are stayed and will be governed by the Chapter 11 plan.

5 Both of those objections are meritorious and would
6 require the denial of the motion. There is really no
7 procedural basis to consolidate and jointly administer
8 either of the Debtor's cases or the Bass claims in these
9 cases with the litigation pending in New Jersey, which
10 raises totally if issues unrelated to the claims against
11 these debtors except only in terms of the potential for
12 providing some context for the assertions in the third
13 proposed amended complaint.

14 In addition, the Court would not have jurisdiction
15 over those causes of action, i.e. the causes of action in
16 the New Jersey court against the non-debtor parties which
17 are not covered under 28 U.S.C. 1334. Those causes of
18 action neither relies under the Bankruptcy Code or in a
19 bankruptcy case, nor are they related to this bankruptcy
20 case in that they do not have a conceivable effect on the
21 case or the debtor's estates. They assert causes of action
22 against the non-debtor parties, based on my review of the
23 complaint, on a theory that the New Jersey actors
24 discriminated against Mr. Bass by excluding him from various
25 essential services for the participation and programs,

1 activities, or services offered by the State of New Jersey
2 public and private entities that received federal funding to
3 provide healthcare benefits based upon his alleged
4 disability arising from drug addiction.

5 The complaint also asserts claims against the
6 State of New Jersey or entities within the rubric of the
7 State of New Jersey based on their asserted investments in
8 the Debtors --

9 MR. BASS: Excuse me, Judge --

10 THE COURT: -- which are not in fact -- just is
11 not in fact the case. They have not invested in the
12 Debtors. The Debtor's shareholder structure is clear, or
13 ownership structure is clear, and it does not include any
14 such investments.

15 So there really is not subject matter jurisdiction
16 to have this Court take on the determination of the
17 litigation in New Jersey. The Court will of course retain
18 jurisdiction over the claims filed in these Chapter 11 cases
19 by Mr. Bass, but only those claims.

20 Secondly, as I noted, the motion seeks -- I am
21 interpreting injunctive relief in two respects that may be
22 related. One is to have the United States Trustee file a
23 derivative claim to protect his claim against fraudulent
24 conveyance under Section 548 of the Bankruptcy Code and to
25 have this Court and the U.S. Trustee avoid and stop payments

1 I gather under the plan to the State of New Jersey. There
2 really is no basis for such an injunction either in terms of
3 the operation of the statute, which puts the fraudulent
4 transfer cause of action within the estate and therefore the
5 control of the Debtor's estate barring the grant of
6 derivative standing, the basis for which has not been shown
7 here, or what I take to be the request for a pre-judgment
8 attachment of distributions to the State of New Jersey based
9 on the alleged right to do so premised upon the underlying
10 complaint filed in the New Jersey court. There really is no
11 basis for any such pre-judgment attachment. Moreover, it
12 really should not be sought in this Court, even if there
13 were such a basis. It should be sought from the Court where
14 the claim that is pending that is the basis for the alleged
15 attachment.

16 That's not an encouragement to do so. It is only
17 an observation that this Court really would not have
18 jurisdiction over such an asserted remedy. Moreover, based
19 upon the Court's consideration of the complaint that has
20 been filed, it would appear that there would be no
21 likelihood of success on the merits with respect to such an
22 injunction in any event given what I've already identified
23 as a fatal flaw in the complaint, which is an assertion that
24 somehow the State of New Jersey or New Jersey entities have
25 an ownership interest in these debtors, which is flatly

1 contradicted by the record before me.

2 So I will deny the motion. I don't know whether
3 either of the objectors has already prepared a draft order.
4 If not, I will ask the Debtors to prepare an order denying
5 the motion for the reasons stated on the record. You should
6 email a copy to Ms. Hamilton, Mr. McClammy, and to Mr. Bass
7 when you email it in to chambers.

8 MR. MCCLAMMY: We can do that. Thank you, Your
9 Honor.

10 MS. HAMILTON: Thank you, Your Honor.

11 THE COURT: Okay. Thank you.

12 MR. BASS: Judge, before (indiscernible).

13 THE COURT: Okay.

14 MR. BASS: Can you hear me?

15 THE COURT: I really can't, Mr. Bass. You're
16 coming in and out. And I'm sorry for that. I can generally
17 hear people on these calls, but it's just not working right
18 now.

19 But in any event, I've ruled on this based on the
20 papers.

21 MR. BASS: Okay, I've got that. I'd just like to
22 have a copy of the state's motion, their opposition.

23 THE COURT: Well, it's on the docket. So you can
24 get it off the docket. I'm sure Ms. Hamilton -- I trust she
25 served you with it. But she can send you a copy in any

1 event.

2 MS. HAMILTON: I did, Your Honor. I'm happy to
3 send another.

4 THE COURT: Okay.

5 MR. BASS: I appreciate it.

6 THE COURT: Okay, very well.

7 MR. BASS: Thank you.

8 THE COURT: All right. The next matter on the
9 calendar is a motion by the United States Trustee for direct
10 certification of its appeal of the Court's order confirming
11 the Chapter 11 plan as well as, although this is barely
12 addressed in the motion, the Court's subsequent order
13 authorizing certain preliminary steps to prepare for the
14 plan going effective. That motion has been joined in by
15 what I'll refer to as the appealing states, that is those
16 states who have also appealed the confirmation order. And
17 in addition, by what we have been referring to as the
18 Canadian creditors, that is certain Canadian municipality
19 and first nations claimants.

20 I reviewed those pleadings as well as the
21 responses that were filed yesterday by the Debtors, the
22 multi-state governmental entities group, the joinder in the
23 debtor's pleading by the Ad Hoc Group of Individual Victims,
24 the ad hoc committees, that is the Ad Hoc Committee of
25 Governmental Entities and the Official Committee of

1 Unsecured Creditors.

2 I appreciate that in addition to the motions, the
3 U.S. Trustee sought an expedited hearing on the motions
4 which has not been opposed. And, frankly, I'm not even sure
5 that such a motion is necessary or was necessary given that
6 we were here on October 14th and the motion was filed on
7 October 1. But I gather no one opposes the request for
8 expedited treatment. Is that correct? Okay.

9 So I will grant that motion.

10 MS. ISAACS: Your Honor, this is Ellen Isaacs
11 (indiscernible). I would like to say something, please, to
12 Your Honor.

13 THE COURT: Well --

14 MS. ISAACS: You keep addressing (indiscernible)
15 attorneys only --

16 THE COURT: Ms. Isaacs, I don't believe -- Ms.
17 Isaacs, I don't believe you have taken a position on this
18 motion. So I --

19 MS. ISAACS: Okay. What I have a position on,
20 Your Honor, and I'd like for you to please hear me -- it's
21 that you --

22 THE COURT: No. I'm not going to hear -- I'm only
23 going to hear the matters that are before me on this motion.

24 MS. ISAACS: This has to do with this motion.

25 THE COURT: Well, then I will hear you when there

1 is appropriate time for it. All right? Not right now.

2 MS. ISAACS: Okay. I will patiently wait.

3 THE COURT: Yes.

4 MS. ISAACS: Thank you.

5 THE COURT: Okay. All right. So I have read the
6 pleadings on this and I'm happy to hear brief oral argument.

7 MS. EITEL: Good morning, Your Honor. This is Nan
8 Eitel for the United States Trustee, appearing for the U.S.
9 Trustee.

10 THE COURT: Good morning.

11 MS. EITEL: First, Your Honor, Section 158(d)
12 provides four independent criteria warranting certification
13 of a directed review and appeal to the circuit court. And
14 although the U.S. Trustee satisfies all four of those gates,
15 it need only satisfy one. And if one is satisfied,
16 certification for direct review is mandatory and there is no
17 discretion.

18 I think it's important to note that the merits of
19 the United States Trustee's appeal are not before the Court
20 today and the Court need not find that the appeal itself
21 would be meritorious, though of course we believe that it
22 should be.

23 Second, Your Honor, before turning to the argument
24 on the four criteria and why each is satisfied here, it's
25 important to note how puzzling the Debtor's opposition is to

1 direct certification. It seems at odds with everything that
2 the Debtors have said for two years about the need for
3 expedition in completing this case and to get money out for
4 the abatement programs and the creditors.

5 Over and over again, Mr. Huebner and his
6 colleagues sit at the podium talking about the need to go
7 more quickly. And we agree, and as a result proposed the
8 most aggressive of the briefing schedules at the district
9 court on the merits and also seek direct review as a result.

10 The opposition is also perplexing, Your Honor,
11 because in the shareholder agreement that was approved as
12 part of the plan of reorganization at 2.09 obligates the
13 Debtors and the Sackler family not only to agree to direct
14 certification, but also to seek it. Specifically the
15 language refers to the NDT -- and the agreement defines the
16 NDT to be the Debtors until the plan goes effective -- shall
17 promptly request that all appellants and appellees
18 (indiscernible) consent, that the appeal be certified for
19 direct appeal. If the consent cannot be promptly obtained,
20 the NDT, the Debtors, shall promptly make a motion to the
21 bankruptcy court under 28 U.S. Code § 158(d)(2)(B)(i)
22 requesting that the appeal be certified.

23 And I think it is this Court's expectation based
24 on comments at earlier hearings, both at the confirmation
25 proceeding and thereafter, that every appellant should be

1 seeking expedited review. And I think he said

2 (indiscernible) that we would get it.

3 And there's also a fallacy in the oppositions
4 about the delay, Your Honor. Seeking direct certification
5 has no effect and no delay on the district court appeal.
6 The matters will go forward on a parallel path and not a
7 sequential path. So there is a distinct possibility that,
8 given how quickly Judge McMahon tends to act, that the
9 District Court will outrun the Second Circuit. But the
10 Second Circuit. But the Second Circuit could also just take
11 the appeal and adopt for expedited briefing schedule as its
12 own, which would make (indiscernible) sense.

13 THE COURT: Well, can I interrupt you on that?
14 The Debtors have asserted, as has the Committee as something
15 I should take into account, although frankly the circuit
16 itself has been clear that simply expedition is not a factor
17 in its determination to take an appeal, that a request for a
18 direct appeal can add significant time to the appeal
19 process. Do you have a view on that or any information on
20 that point?

21 MS. EITEL: Your Honor, the only reason I'm
22 bringing up the issue of delay is because it's been argued
23 by the Debtors and not by the United States Trustee and by
24 the Committee. I mean, they are correct that there are four
25 factors about whether there's controlling precedent, whether

1 it's a matter of public importance, or whether it resolved
2 the case. But speed is not one of the criteria either way -
3 -

4 THE COURT: All right. So why are we arguing this
5 point? Unless for PR. Which I don't appreciate. I
6 understand the point that you just made; speed alone is not
7 a factor.

8 MS. EITEL: It's just simply that the Debtors have
9 represented to the Court that somehow the U.S. Trustee is
10 delaying the matter, and that's simply wrong as a factual
11 matter.

12 THE COURT: Well, I don't view that. I don't
13 think you're trying to delay the matter.

14 MS. EITEL: Thank you, Your Honor. I'll just move
15 on.

16 THE COURT: Okay.

17 MS. EITEL: And one additional point before
18 getting to the criteria.

19 In the Committee's opposition in Footnote 3, it
20 was puzzling for different reasons, for the failure to not
21 understand DOJ authorities. They were shocked that the UST
22 announced that the solicitor general had authorized the U.S.
23 Trustee to file a motion for direct certification to the
24 Second Circuit and deemed this somehow nefarious. But, Your
25 Honor, rudimentary research and consultation with an

1 appellate lawyer would have led them to 28 CFR --

2 THE COURT: Again, it's not really an issue before
3 me. I don't -- again, you are correct. The merits of the
4 appeals are not part of what's before me on this issue, on
5 your motion and the joinders by the appealing states. And
6 similarly, whether any of those states or the U.S. Trustee
7 are somehow acting in a way that the appellees don't like is
8 not really before me, either.

9 MS. EITEL: That's fine, Your Honor. If I just
10 may conclude by saying it's mandated by the Code of Federal
11 Regulations (indiscernible) nothing nefarious to be gained,
12 only the solicitor general can approve.

13 THE COURT: Okay.

14 MS. EITEL: Let's turn now to why we're here,
15 which is the four criteria.

16 The first criteria, is there a legal question with
17 no controlling precedent from either the circuit or the
18 Supreme Court. And Judge McMahon agrees with the U.S.
19 Trustee. As she said in court on Tuesday, "As far as I can
20 tell, this is a pure question of law. About as pure a
21 question of law as you can get. The core issue is whether
22 this is constitutional or whether this is statutorily
23 authorized. Simply because this case is complicated,
24 unwieldy, involving lots of issues and parties doesn't make
25 the issue of third-party releases anything other than a

1 legal question.

2 Moreover, the standard is, is there no controlling
3 precedent either from the Supreme Court or the Second
4 Circuit. The Supreme Court has never decided the issue of
5 the due process nature and implications of a non-consensual
6 non-debtor release. And that alone is sufficient to
7 establish that certification is warranted and required.

8 But if we want to look at precedent within the
9 Second Circuit, we need only compare or contrast the
10 Debtor's statements on this issue to conclude the Second
11 Circuit has not squarely addressed the issues presented by
12 this appeal.

13 In the opposition, the Debtor said, "Third party
14 release in bankruptcy and the circumstances under which
15 those releases may be approved are issues that have been
16 settled in the circuit for decades."

17 In contrast, on June 16th, Debtors and other
18 opponents wrote to Judge McMahon seeking a joint tribunal
19 for confirmation. And I quote, "While Your Honor and the
20 Third Circuit have recently held that bankruptcy courts may
21 issue a final order confirming a plan providing for third-
22 party releases," and citing the cases, "The Second Circuit
23 has yet not squarely addressed these issues." We need not
24 go further than the Debtor's admission in the June letter.
25 The Second Circuit has not squarely addressed the issues

1 presented by the Purdue releases.

2 Next, Your Honor, in discussion about what the
3 case law was within the Second Circuit, I think people were
4 shocked that the U.S. Trustee argued that Metromedia did not
5 hold anything about third party releases because it was
6 dismissed for equitable movements. So the entire discussion
7 there is dicta. Admittedly, it's dicta that has been
8 followed and adhered to and discussed at length by multiple
9 opinions with the Second Circuit. But at the end of the
10 day, it's not a holding, it's dicta. Metromedia didn't
11 answer or address the due process question presented here,
12 either.

13 With respect to due process, the Debtors
14 repeatedly refer to all of the notice and the publicity that
15 was given to provide due process with respect to this case.
16 But when they do that, they are wrongly conflating the issue
17 of due process with respect to Purdue's creditors or their
18 claims against Purdue and their participation in Purdue's
19 bankruptcy. The objection goes to great lengths to
20 (indiscernible) process. But that's a red herring because
21 we don't challenge the adequacy of the notice
22 (indiscernible) creditors, only about the due process
23 related to the Sacklers.

24 The Debtor has also suggested that the United
25 States Trustee wasn't getting facts about not receiving

1 value for claims under the plans for the third-party
2 releases. But, Your Honor, that's straight from the plan
3 itself and it's cited and quoted in our motion papers where
4 it says, "Payment is only made for claims held against the
5 Debtors and not against non-debtor parties."

6 Debtors do get one thing right about the UST
7 position on releases, that bankruptcy courts do not have the
8 power or the constitutional authority to impose non-
9 consensual releases of such claims of non-debtors versus
10 non-debtors.

11 The Debtor also says that we're saying the courts
12 of appeals have been violating due process for decades. I
13 would simply note that in a related context until the
14 Supreme Court decided Stern v. Marshall, bankruptcy courts
15 were routinely exceeding constitutional authority until one
16 litigant challenged that notion all the way to the Supreme
17 Court. So it's not unheard of for issues to be assumed that
18 they are okay until they are not and decided by the Supreme
19 Court.

20 Speaking of Stern, Your Honor, every opponent here
21 today previously wrote to Judge McMahon in that same June
22 16th letter asking for the reference to be withdrawn in two
23 discrete matters because there are stern issues related to
24 the third-party releases, which is also part of United
25 States Trustee's appeal. I quote, "In order to eliminate

1 any doubt concerning the finality of any order confirming
2 the plan, the Debtors respectfully request that Your Honor
3 consider presiding as a joint tribunal only on two discrete
4 issues; the plan's treatment of personal injury claimants
5 and the imposition of non-consensual third-party releases."

6 This to me seems an admission of there is a
7 possible constitutional infirmity in this Court's authority.
8 And again, that alone should warrant taking up appeal.

9 The Second Circuit, simply put, has not considered
10 the issue of due process. One cannot read the past decade
11 or two of Supreme Court decisions on bankruptcy matters as
12 anything of an endorsement of expansive equitable powers or
13 creative solutions outside the lines. Jevic, Law v. Siegel,
14 ASARCO, RadLAX, Stern, (indiscernible), there are

15 others, in every one of those cases, bankruptcy
16 practitioners were surprised to find the narrow view and the
17 narrow holding of the bankruptcy court's authority and
18 power.

19 So the United States Trustee satisfies Matter 1.
20 It's a legal question on which there is no Supreme Court
21 precedent and there is a division of opinions.

22 One need only --

23 THE COURT: Well, wait, wait. Where is division
24 of opinion in the Second Circuit?

25 MS. EITEL: That's not the standard, Your Honor.

1 It's within the Second Circuit. It's not that the Second
2 Circuit has contradicted itself. That wouldn't make any
3 sense.

4 THE COURT: But no, within the Second Circuit.
5 I'm not saying at the Second Circuit. I'm saying within the
6 Second Circuit.

7 MS. EITEL: For example, Aegean Marine as --

8 THE COURT: Let's read Aegean Marine. I've been
9 hearing about Aegean Marine for quite a while now. I
10 addressed it in my opinion. Let's read it together. All
11 right? And let's read SunEdison together. Do you have it
12 there, ma'am?

13 MS. EITEL: I do not have it in front of me. It's
14 on my computer. But I am familiar where the Court talked
15 about the participation trophies.

16 Your Honor, the point is that there are -- there
17 are different --

18 THE COURT: No, this is important. Because you
19 and at least one legal professor who doesn't know how to
20 read a case -- I'm not saying you don't, I'm saying he
21 doesn't -- have miscited this case. Something that a first-
22 year law student can understand. So let's read it. All
23 right?

24 It cites Metromedia. It relies on Metromedia.
25 Does it not?

1 MS. EITEL: It does. It does, Your Honor.

2 THE COURT: And Judge Wiles says, "The governing
3 case law," that's a quote, "The governing case law requires
4 me to consider not only the contributions made by the
5 proposed releases, but also the particular claims that are
6 to be released." He recognizes that there is governing case
7 law, having cited it. Metromedia. He also cites
8 Residential Capital and Johns Manville and then says I don't
9 have any of those facts before me here.

10 Let's go to SunEdison. All right?

11 Oh, by the way, Judge Wiles also, I think you'll
12 have to recognize, does impose a non-consensual release as
13 far as an exculpation is concerned, does he not?

14 MS. EITEL: He does, (indiscernible) --

15 THE COURT: All right. All right. So I guess
16 he's following something. I guess he follows some
17 jurisdiction.

18 And then as far as SunEdison is concerned, Judge
19 Bernstein says that he does not believe that the facts here
20 support under Metromedia the grant of the injunction,
21 although he finds that the court does have jurisdiction to
22 enjoin.

23 So, you know, it's one thing to say that people
24 discuss the extent of this case law, it's really another to
25 say that these are holdings that say that there is no such

1 case law. And I think --

2 MS. EITEL: Your Honor --

3 THE COURT: -- one needs to be very clear on that
4 point.

5 MS. EITEL: Your Honor, I think reasonable minds
6 can differ with respect to the vast range of case law even
7 within the Second Circuit at the bankruptcy court level.
8 And I understand that --

9 THE COURT: Well, you cited two cases. And I've
10 just gone through them again. And while they raise concerns
11 about the extent of releases, they do so in the context of
12 or the rubric of the Metromedia factors and Johns Manville
13 and the many cases that have actually imposed third party
14 releases and injunctions in the Second Circuit.

15 MS. EITEL: And there are many cases that have
16 not. And --

17 THE COURT: Where? In the Second -- where in the
18 Second Circuit that have not recognized the power to do so?
19 Name me one.

20 MS. EITEL: Your Honor, if -- there are multiple
21 cases where it may be in the context of particular facts,
22 but Metromedia has not -- does not decide the issue. As you
23 said yourself --

24 THE COURT: So the reference to governing case law
25 in both of those opinions was just sort of thrown out there?

1 You actually think that Judge Wiles, if the facts would have
2 in his view have fit within Metromedia would have said oh,
3 well, I'm not going to follow that?

4 MS. EITEL: Your Honor --

5 THE COURT: That really would be extraordinary.
6 That really would be a basis for a direct appeal, would it
7 not?

8 MS. EITEL: Your Honor, I return to what you
9 yourself said about reading the case as a first-year law
10 student. You go to law school, and you get the primer and
11 you're told what's the holding and what's the dicta. And I
12 think for anyone to go in and say that Metromedia held
13 anything about a third-party release is not reading the case
14 carefully.

15 That said, I understand very well that Metromedia
16 has taken on a life of its own and that is deemed
17 controlling case law within the Second Circuit. But a clear
18 and careful reading of Metromedia would show otherwise. But
19 we can ignore all that, Your Honor. And I understand that
20 you have a different view with respect to there is conflict
21 within the circuit. It really doesn't matter because the
22 bottom line is there is no Supreme Court decision on the
23 constitutional authority or the due process rights on third-
24 party releases. The Supreme Court has never decided the
25 issue.

1 THE COURT: I'm sorry, are you saying that
2 (d) (2) (A) (1) applies if there is controlling authority in
3 the circuit but not at the Supreme Court? Is that how you
4 interpret that section?

5 MS. EITEL: Yes. It's an or, Your Honor. If
6 there is no controlling authority at the Second or the
7 Supreme Court. And there is none at the Supreme Court.
8 It's not and, it's or. It's disjunctive. It's one or the
9 other.

10 THE COURT: Do you have any cases that support
11 that or commentators?

12 MS. EITEL: Other than that the word or is
13 disjunctive, I haven't gone to look for them. I'd be happy
14 to provide a supplemental briefing on the topic.

15 THE COURT: So you're basically saying that
16 whenever the Supreme Court hasn't ruled on t bankruptcy
17 issue, even if the circuits have and even though the
18 legislative history, which the Weeber case relies on
19 heavily, focuses on getting these opinions up at the circuit
20 level, that we have to force the circuit to do work on any
21 case when the Supreme Court hasn't ruled?

22 MS. EITEL: If there's no controlling precedent,
23 Your Honor, and it's a pure legal issue. That's not a
24 particularly common occurrence, as the Debtors themselves
25 point out.

1 So we can move on to -- there's four gates. And
2 the United States Trustee submits that we've satisfied gate
3 one.

4 THE COURT: Okay.

5 MS. EITEL: The second gate is a matter of public
6 importance. I think Your Honor and the Debtors have said
7 there has never been a case like this. And the issues
8 transcend the case. And I understand that the issue is not
9 in the context of Purdue Pharma, it's the issue of third
10 party release. They're important in the bankruptcy context,
11 and they are made increasingly frequent use of. And it is
12 very important with respect to how the public interacts.

13 I think the Court is aware of in particular this
14 case, one of the matters that has most, it had the public
15 pro se litigants engaging with the Court, is about the
16 third-party release. It's very important to the public
17 about what authority a Court has to issue a third-party
18 release.

19 Moreover, Congress itself has not one, not two,
20 not three, but four pieces of legislation pending on the
21 authority to issue a third-party release in bankruptcy.
22 Whether one agrees with that is right or wrong, it simply
23 suggests that it's a high-profile matter that is very
24 important to the public.

25 It would be disingenuous in the context of this

1 case to pretend that there is not an extreme degree of
2 public (indiscernible) on this legal issue given the impact
3 of Purdue Pharma and the Sackler family's conduct here.
4 It's a public health crisis. It's been very traceable to
5 the conduct of the Sackler family who is being released.

6 And, Your Honor, here if the Sackler family
7 members had filed for individual bankruptcy relief, under
8 Section 523, they couldn't get the kind of release that
9 they're getting now. They're getting a more generous
10 treatment than (indiscernible) unfortunate debtor would ever
11 be afforded in an individual case. Claims for things like
12 fraud are being discharged when a debtor could not get that
13 under 523.

14 Your Honor, this simply hasn't been decided
15 before. Third-party releases are very important to the
16 public interest whose rights are being affected and
17 basically given up as participation trophies, as Judge Wiles
18 said in Aegean Marine, and it needs to be decided by the
19 Circuit Court of Appeals both whether there is a due process
20 issue with non-consensual, non-debtor releases, and whether
21 there is a Stern issue with non-consensual, non-debtor
22 releases.

23 The third gate is is there a question of law
24 requiring resolution in conflicting decisions within the
25 Circuit. Your Honor, I think we just went through all of

1 those with respect to Aegean Marine, SunEdison, and this
2 case. And the result may well be different depending on
3 what district you go to, what state you go, and which
4 particular courtroom you go to.

5 THE COURT: Let's just cover that now. All right?
6 Is Connecticut in the Second Circuit?

7 MS. EITEL: Yes, Your Honor

8 THE COURT: Yes. All right?

9 MS. EITEL: I mean, yes. Yes.

10 THE COURT: So what in earth are you talking
11 about? I want you to come clean on this. What are you
12 talking about when you make that assertion innuendo?

13 MS. EITEL: Judge, I am making no innuendo, nor
14 assertion --

15 THE COURT: You're not? Good.

16 MS. EITEL: I'm not. And --

17 THE COURT: Then I think you should retract your
18 statement.

19 MS. EITEL: Your Honor, it's simply that there are
20 differing understandings of the extent of the authority that
21 courts have to do this.

22 THE COURT: In the Second Circuit? You have not
23 cited me one case for that. Not one.

24 MS. EITEL: Your Honor -- okay, Your Honor.
25 Chassix Holdings, for example. That's a fairly unique case

1 where the issue of impairment and the right to vote. So a
2 class that was deemed not to be impaired and deemed to
3 consent to the plan was being forced to get a third-party
4 release. And the Court came and said --

5 THE COURT: Right.

6 MS. EITEL: -- you know what? That --

7 THE COURT: Yes. Every court in this circuit
8 would rule the same way. I have ruled that way multiple
9 times before and after Chassix.

10 MS. EITEL: But other courts, Your Honor, have
11 not.

12 THE COURT: Which ones in this circuit?

13 MS. EITEL: Your Honor, I don't have a laundry
14 list of --

15 THE COURT: You don't. You're just throwing this
16 stuff out there. And it's -- you're right; it is important.
17 And if you are casting aspersions on the integrity of any
18 judge, any bankruptcy judge in this circuit, you'd better be
19 prepared to say why.

20 MS. EITEL: Your Honor, I have cast no aspersions,
21 and nor do I --

22 THE COURT: You don't? Are you going on record to
23 say that?

24 MS. EITEL: Yes, Your Honor. No aspersions in the
25 --

1 THE COURT: Because it was suggested to me about
2 two minutes ago that you were when you referred to --

3 MS. EITEL: No, Your Honor.

4 THE COURT: -- particular judges and particular
5 states.

6 MS. EITEL: Your Honor, Your Honor, you are
7 misinterpreting my argument, and I apologize for that, for
8 not being more clear.

9 THE COURT: All right. Well, you don't have any
10 facts apparently to back it up. So let's just move on from
11 that point.

12 MS. EITEL: Your Honor, I would just simply
13 conclude with that there is not uniformity within the
14 courts. And --

15 THE COURT: Where? Which courts?

16 MS. EITEL: Your Honor, we just talked about
17 Aegean Marine, we've talked about SunEdison --

18 THE COURT: All right.

19 MS. EITEL: -- and we've talked about --

20 THE COURT: Those are your two cases. And I've
21 already read those cases. And I know exactly what they say.

22 MS. EITEL: We've talked about Chassix Holdings.

23 THE COURT: And I think, frankly, if Judge Wiles
24 had had this case, you would have been shocked if he had
25 ruled differently. Because this case is not Aegean Marine.

1 MS. EITEL: Your Honor, just to conclude this
2 third point, I want to be very clear. I am not casting
3 aspersions on the integrity of this Court, any other court,
4 or any other judge. Reasonable minds can differ over these
5 issues, which is why we take appeals and why we make legal
6 argument and why judges may reach different conclusions in
7 different matters. And because there have been dissimilar
8 conclusions on similar facts, a fact that I know you
9 disagree with, suggests that it is more important than ever
10 that this get back to the Second Circuit for the due process
11 and Stern issue squarely presented to the Second Circuit for
12 decision. It's not a matter of integrity; it's a matter of
13 a question of law and that we need to get the law settled on
14 these important matters.

15 Finally, Your Honor, the fourth criteria is an
16 immediate appeal may materially advance the progress of the
17 case.

18 The response of the Debtor, and that I think lead
19 the Committee awry, is that we need to go to the district
20 court because it will benefit (indiscernible) at the
21 district court. This case is a little different than the
22 garden variety bankruptcy case where ordinary district court
23 review likely offer some additional benefit. But these
24 issues have been thoroughly briefed, fairly contested over a
25 lengthy confirmation hearing, and the subject of much

1 discussion and reflection by Your Honor in issuing your
2 opinion. There is no need to stop at the district court.

3 But that said, it's not going to delay the case by
4 going to the Second Circuit because I don't think anyone
5 thinks for a second that this case is going anywhere but the
6 Second Circuit. It's just simply a matter of time.

7 THE COURT: But the case law is clear that that
8 fact isn't a basis for a direct appeal. Right? The fact
9 that parties are going to go eventually to the circuit is
10 not a basis to grant a direct appeal.

11 MS. EITEL: Well, no. But the -- we discussed at
12 the beginning about the expedition. But if it may
13 materially advance the progress of the case. Clearly this
14 can materially advance the progress of the case because it's
15 different than saying a need for speed versus it's going to
16 advance the case. The case is going to the Second Circuit -
17 -

18 THE COURT: No, but the case law on that point is
19 consistent, as is the commentary. The fact that it's going
20 to the circuit eventually is not a basis for certification
21 of direct appeal.

22 MS. EITEL: Well, that may be particularly true.
23 But what I'm explaining, Your Honor, is that this has been
24 very well briefed and very well argued at the bankruptcy
25 court level. It's being given a level of treatment and

1 discussion that is unlike, I think the Court would perhaps
2 agree, your garden variety Chapter 11 bankruptcy case. This
3 isn't Mom and Joe's pizza shop where there --

4 THE COURT: There was a lot of sophisticated
5 briefing in Sabine. There was a lot of sophisticated
6 briefing in GM.

7 MS. EITEL: And GM (indiscernible) once, if I
8 recall correctly, on expedited briefing. And the Second
9 Circuit decided very, very quickly in that case. I think it
10 was only the second time where the matter was not certified
11 if I recall correctly. I think GM did go up quickly in the
12 second circuit (indiscernible) particular to that case. And
13 also that that this was a matter of public importance, much
14 like this one.

15 Your Honor, just to conclude, there are four gates
16 for certification. The United States Trustee only has to
17 satisfy one. Here, Judge McMahon said it best this week.
18 She would -- that appellants for their part raise important
19 questions under the Constitution, the Bankruptcy Code, and
20 Second Circuit law. The importance of having those issues
21 considered and decided on appeal cannot be understated. And
22 we would add, Your Honor --

23 THE COURT: Well, I agree with that completely.

24 MS. EITEL: -- oh appeal -- on appeal by --

25 THE COURT: But that's in the -- but no, that's in

1 the context of a motion for a stay.

2 MS. EITEL: Correct, Your Honor.

3 THE COURT: Not in certifying an appeal to the
4 Court of Appeals. Is that your concern? I sort of want to
5 cut to the chase on this last point. I think the last
6 point, although I don't believe this is how the case law
7 treats it, I think you're arguing that we'll get a faster
8 result if there is a direct appeal. And in any event, Judge
9 McMahon can continue on with the appellate process as the
10 statute permits pending the determination by the Circuit
11 whether it wants to accept a direct appeal. That's what
12 you're -- I mean, that's really what you're saying, right?

13 MS. EITEL: Your Honor, yes. We are pursuing two
14 parallel paths. And as I've said earlier, Judge McMahon may
15 outrun the Second Circuit for the certification.

16 THE COURT: Right. Although I do have some real -
17 - I do have some real concern. Judge McMahon is a terrific
18 judge, and no one can say I think that there's any judge in
19 the Southern District who is more independent. But
20 presiding over an appeal like this, knowing that at any
21 moment the circuit could take it from you, isn't that kind
22 of like playing an exhibition baseball game or football game
23 or basketball game? You know, a preseason game. You know,
24 there's nothing more important than the matter before you.
25 But if you believe it's going to be taken away potentially

1 at any moment, I wonder whether that's what the circuit
2 really wants.

3 MS. EITEL: Your Honor, Judge McMahon expressed no
4 concern with that. She is well aware of the request for
5 direct certification, and she mentioned it multiple times on
6 Tuesday. And she said two things in particular. She said
7 if the Second Circuit takes the case, they can keep my
8 expedited briefing schedule and maybe they'll ask me to sit
9 by designation. She had no concerns whatsoever with the
10 idea of putting in this work and having the case taken away.
11 And I agree, she has done a tremendous job of, just this
12 week alone, turning around very quickly some decisions on
13 the important issues with respect to who appellees are, who
14 needs to intervene in the appeal, and what needs to happen
15 with respect to the motion for stay. But Judge McMahon
16 herself said they can take it; they can take my schedule.
17 And if they want me, I'll go sit with them there, too.

18 And we would simply say that this is a case that
19 satisfies four criteria for --

20 THE COURT: I'm sorry, I still want to explore
21 that last point a little bit. This is a question for all of
22 the parties. Have any of you -- I'm not saying you should,
23 I just wonder if you have. Have any of you gotten any sense
24 from the Court of Appeals as to when they would consider
25 accepting a direct appeal and their ability to hear it on an

1 expedited basis.

2 MS. EITEL: Your Honor, we would have no ability
3 to do that because we haven't filed anything with the Second
4 Circuit. I think that you can look at -- there is a range
5 of options. In General Motors, they acted incredibly
6 quickly given the public importance there. In other cases,
7 they can sometimes take months to decide. There is no
8 indication one way or another what it is that causes them to
9 act with expedition on accepting the direct review. And it
10 may be at the end of the day, Your Honor, that we'll get a
11 decision on the merits out of Judge McMahon before the
12 Second Circuit decides to take the appeal and it just goes
13 up in the ordinary course. But we're trying to pursue two
14 parallel paths to --

15 THE COURT: Do you have any sense as to whether
16 the request for acceptance of a direct appeal will
17 accelerate in any way the determination, or are those two
18 separate panels that would handle it?

19 MS. EITEL: Your Honor, I don't know the answer to
20 that question in terms of you say, like, accelerate the
21 consideration once they take the direct certification?

22 THE COURT: Right.

23 MS. EITEL: It's up to the panel whether they
24 would take the expedited briefing schedule. And we would --
25 just as we proposed at the district court, United States

1 Trustee would propose a very aggressive expedited briefing
2 schedule. And we actually think Judge McMahon's solution
3 was a good one, that if they take it before she has heard
4 oral argument on November 30th, that they could just accept
5 her briefing schedule.

6 THE COURT: I guess the last point I raise is --
7 and this comes through strongly in the Weeber case. The
8 Circuit has been clear -- and this is consistent with
9 jurisprudence generally and the structure of the federal
10 courts -- that the circuits benefit from the analysis of the
11 lower courts by the lower courts, particularly where there
12 is an extensive record. And obviously Judge McMahon has
13 tried scores of cases. She can evaluate a record really,
14 really well. Obviously the Court of Appeal can, too. But,
15 again, they have said Congress emphasized the importance of
16 our expeditious resolution of bankruptcy cases, but it did
17 not wish us to privilege speed over other goals. Indeed,
18 speed is not necessarily compatible with our ultimate
19 objective. Answering questions wisely and well in many
20 cases involving unsettled areas of bankruptcy law reviewed
21 by the district court would be most helpful. Courts of
22 appeal benefit immensely from reviewing the efforts of the
23 district court to resolve such questions. Citing Supreme
24 Court as well as Justice Cardozo, explained that the common
25 law process goes inch by inch.

1 So the court of appeals doesn't get a lot of
2 bankruptcy cases. Congress was judicious in Section 158(d)
3 in changing that. It chose not to have direct appeals in
4 most cases. And the district courts do get more of these
5 cases. Judge McMahon has a lot of experience with them.
6 You know?

7 MS. EITEL: Your Honor, there is no --

8 THE COURT: She has granted injunctions, she has
9 denied injunctions, she has narrowed injunctions. She has
10 thought about these issues for years. And there are times -
11 - I picked on a law professor earlier, now I'll give law
12 professors some kudos. In a recent case where there was a
13 direct appeal, the Gravel case, a bunch of law professors
14 said no, you missed the boat. You should reconsider this.
15 There wasn't an intervening district judge to have addressed
16 nuances that might have been missed by the bankruptcy court
17 or at least put those nuances in a context where the court
18 of appeals could weigh differing views, or maybe the same
19 view.

20 So ultimately here, although it's two different
21 things -- there is the certification and then there is the
22 acceptance -- the lower courts when asked to certify direct
23 appeal are really trying to understand what Congress wanted
24 and what the Circuit views Congress wanted in Section 158.

25 MS. EITEL: Your Honor, may I respond?

1 THE COURT: Yes.

2 MS. EITEL: And I would agree, it's probably a
3 universe of 99 percent of the cases that are not appropriate
4 for direct review. The cases that don't get a fully
5 developed record and cases that don't have full necessarily
6 engagement. I understand the Sabine decision was a case
7 like that. But there is a tremendous discussion and
8 development of the record and consideration of this issue
9 from this Court such that the intermediate appeal is of much
10 limited -- much less utility than it would be in a typical
11 bankruptcy case.

12 And I would finally make this point, Your Honor.
13 The Second Circuit may or may not take it, but we need to be
14 able to flip the switch. We need this Court's authorization
15 for us to go ask for that relief, to go to the Second
16 Circuit. And that's all we're asking, Your Honor.

17 The Second Circuit may agree with you. The Second
18 Circuit may say, United States Trustee, no, we want to hear
19 from Judge McMahon. And the Second Circuit could tell us
20 that. But I think it would be better for the Second Circuit
21 to tell us they don't want to hear from Judge McMahon than
22 for us to guess that they don't to hear from Judge McMahon.

23 THE COURT: Okay. I guess the last point I wanted
24 to say is that if the parties seeking a direct appeal have
25 the concern that somehow if that isn't granted, their rights

1 to a stay pending appeal would be adversely affected, they
2 shouldn't have that concern. That's really a -- that's not
3 -- I think they're two very different issues.

4 MS. EITEL: I appreciate --

5 THE COURT: So if their concern is that they want
6 to make sure that the Second Circuit gets to hear this issue
7 if they seek it to be heard on an expedited basis, I think
8 that concern is not going to be borne out, whether there is
9 a direct appeal or not a direct appeal.

10 MS. EITEL: Thank you, Your Honor. That's
11 reassuring in the sense that I turn back to where we started
12 today, which is the Debtors have been worried about getting
13 out of bankruptcy. And we are happy to do everything
14 possible to get this case to a conclusion and whatever the
15 best path is. I think it would be helpful to hear from the
16 Second Circuit to know do they want to hear it first or do
17 they want to wait. And that's simply the opportunity the
18 United States Trustee is asking for. We believe that any
19 more of the criteria would warrant the entering of the
20 relief and lets let the Second Circuit decide if they want
21 to accept the appeal.

22 THE COURT: Okay.

23 MS. EITEL: Thank you, Your Honor.

24 THE COURT: Thank you. I don't know if any of the
25 joinder parties want to add to that.

1 MR. EDMUNDS: Your Honor, Brian Edmunds for the
2 State of Maryland. May I just quickly make a few points? I
3 don't think you need to hear the whole argument again, and I
4 rely on the papers for most of it.

5 But in response to Your Honor's questions that you
6 asked during the U.S. Trustee's argument, there is no doubt
7 that there is a concern with speed here. Our state has some
8 respectful disagreement with some of the terms of the plan.
9 But I think that everyone here is benefitted by the decision
10 being reviewed and review being completed as quickly as
11 possible. We just have some concerns with the issues that
12 we raise on appeal.

13 The fourth factor under Section 158 talks about
14 whether an immediate appeal will materially advance the
15 progress of the case. That's the factor. And if that's
16 satisfied, that's one reason to certify.

17 I have read the case law and I agree with the
18 Court's conclusion that speed or the fact that it's going to
19 the Second Circuit are not grounds in their own right. But
20 the importance of this case and the importance of I think
21 the case generally, meaning in the constitutional sense of
22 the case, the facts and the public health warrant parties
23 doing everything possible to move this as quickly as they
24 can. And direct review could potentially help that.

25 THE COURT: Well, I'm asking the same question,

1 Mr. Edmunds, that I asked the U.S. Trustee's counsel. The
2 Debtors and the Committee suggest that there's actually a
3 meaningful potential for delay by giving the circuit not
4 one, but two questions, i.e. do they want to accept the
5 direct appeal which has its own life, and then secondly, do
6 they want to -- you know, when they will rule on the merits
7 of the appeal.

8 Do you have any sense of how that first question,
9 how long it will take to be decided?

10 MR. EDMUNDS: Your Honor, I think what is true is
11 that it can vary. It could be that the Second Circuit
12 decides to issue a decision, as it's done in a few other
13 cases, on the standard for granting a direct appeal. And
14 that might make it take longer because it will issue a
15 published opinion. But I think in the run-of-the-mill
16 ordinary circumstance, the certification would be presented
17 to a motions panel which would decide the matter very
18 quickly. Again, it's up to the Second Circuit and it's
19 entirely -- it's difficult to foresee. But based on my
20 experience at least not in this context exactly, but in
21 similar interlocutory appeal type issues from district
22 courts, it can rule quickly.

23 In any case though, whether it does or it doesn't,
24 there is a schedule before Judge McMahon, and it's going to
25 conclude with argument on November 30th, after which I think

1 we can expect she'll issue a prompt decision based on what
2 she has indicated. And if it takes the Second Circuit
3 longer, that will moot the issue I think. If there is a
4 final determination by Judge McMahon in, say, December, then
5 there will be no more need for direct appeal and there will
6 be no need for the Second Circuit to consider it. But if we
7 can advance it a little bit more quickly, I think that it's
8 something that we should do for a lot of the reasons that
9 have been raised in opposition to the motions for the stay.
10 I mean, everyone benefits from getting this resolved
11 correctly and quickly. And those two things are important.
12 But I think that a lot of what the Court has questioned are
13 reasonable things to think about. But those are questions
14 that Second Circuit motions panel can answer and has
15 discretion under Rule 2 of the Federal Rules of Appellate
16 Procedure and under the Second Circuit Internal Operating
17 Procedures to decide quickly if it feels -- if the judges of
18 that panel decide that it needs to be done.

19 And I think given the importance of the case,
20 which I know the Court has recognized, and given the
21 seriousness and all of the things that ride on the case and
22 the outcome, I think that that's something that Second
23 Circuit can determine for itself one way or the other. The
24 factors are present, and they warrant, if the Second Circuit
25 decides to do so, a direct appeal.

1 So I think -- I hope that that answers all of the
2 Court's questions. That's really all I want to do, is sort
3 of be helpful on that. I think if the Court will allow,
4 I'll just rest on the papers and others' arguments for the
5 rest.

6 THE COURT: Okay. That's fine, Mr. Edmunds.
7 Thank you.

8 MR. EDMUNDS: Thank you.

9 MR. GOLD: Good morning, Your Honor. Matthew
10 Gold, Kleinberg Kaplan Wilk & Cohen.

11 THE COURT: Good morning.

12 MR. GOLD: Can you hear me, and may I be heard?

13 THE COURT: Yes.

14 MR. GOLD: Thank you, Your Honor. First, I just
15 want to note so that the record is clear that while Your
16 Honor has referred to us as joinder parties, we did file our
17 own independent motion. And that motion was made jointly by
18 Washington, Connecticut, Delaware, Maryland, Oregon, Rhode
19 Island, Vermont, and the District of Columbia.

20 Today we are appearing on behalf of Washington,
21 Delaware, Rhode Island, Vermont, District of Columbia, and
22 Oregon with respect to this motion.

23 I will not repeat what has been said before in
24 argument, Your Honor. The one point that I would like to
25 particularly elaborate is one of the mandatory prongs, which

1 is is this a matter of public importance. The statute
2 states that as a disjunctive, and we believe that that is
3 the simplest standard to satisfy here.

4 The appealing parties are states. The plan would
5 strip these states of important rights. This is a matter of
6 huge importance to the millions of residents of these states
7 and to their elected officials.

8 To be clear, the issues in this case are important
9 to all of the citizens and inhabitants of the states, not
10 nearly those who might have been considered or claimants in
11 the case. And those are parties that even the Debtor, the
12 UCC, other parties who claim to be fiduciaries for creditors
13 in the case, do not represent the citizens and inhabitants
14 of these states that are interested in having their laws
15 properly enforced and not about letting those who fought
16 those law buy their way out of justice.

17 Now, I understand that reasonable minds can differ
18 about whether that is the effect of Your Honor's ruling.
19 But to say that these are not fair issues of dispute that
20 have not been raised by the parties and that will not have
21 to be decided through an appeal and that these are therefore
22 not matters of huge public importance, I don't see how that
23 case can be made.

24 I will just briefly comment on what Mr. Edmunds
25 said before. I think he's right. I have enormous respect

1 for the panels of the Second Circuit that would hear issues
2 on a stay or whether it would take a case that has been
3 certified. I believe that in a case of this magnitude, of
4 this public importance, with all the great lawyering that
5 all the parties are bringing to bear that there is
6 relatively low chance that this case will slip between the
7 cracks and somehow not be addressed by those parties either
8 to take the case or not take the case. And the chance that
9 it will languish seems to me to be remote. I would submit
10 it is remote.

11 And so, Your Honor, we do echo the call that Your
12 Honor has to service the gatekeeper to certify that, yes,
13 this is a matter of public importance. And then the Circuit
14 Court can decide the Weeber factors that Your Honor
15 mentioned about whether in a matter of public importance it
16 still would rather hear from a lower court or not, or it can
17 take those matters into consideration.

18 And other than that, Your Honor -- well, the only
19 other thing I will add just because it has not been
20 mentioned before, the Debtors and objecting parties are now
21 claiming oh my goodness, there are so many facts in this
22 case. We had a nine-day trial. This is not inherently a
23 (indiscernible) dispute even though in the runup to the
24 confirmation hearing they argued many times that they had
25 gone for papers and that our arguments were essentially

1 legal ones. We think that, yes, there are some facts at
2 play here, but those are not disputed facts. I suppose it's
3 a fact that the appealing states are states. It is a fact
4 in some sense that the actions that are being taken from
5 them are police powers. But Your Honor has already
6 determined that these are police powers. We know that these
7 are states. And so the essential facts that bring this case
8 to a matter of public importance and that undergird the
9 legal nature are not in dispute. Accordingly, Your Honor,
10 we submit that certification should be granted here.

11 THE COURT: Okay. Thank you.

12 MR. GOLDMAN: Good morning, Your Honor. Irve
13 Goldman, Pullman & Comley, for the State of Connecticut and
14 the other states that mentioned by Mr. Gold. May I have a
15 brief period for commentary here?

16 THE COURT: Okay.

17 MR. GOLDMAN: I just want to put some finer points
18 why we believe there is no controlling decision in the
19 Second Circuit on the questions of law that have been
20 presented. And that takes me first to the Metromedia
21 decision where the parties' and the Court's focus has been
22 during this hearing.

23 I think we all understand that as defined by
24 Black's Law Dictionary, a holding is a court's determination
25 of a matter of law pivotal to its decision. It's

1 interesting to note, on the other hand, what the Second
2 Circuit considers to be the highest order of dictum, and
3 that is judicial dictum, which is defined in U.S. v. Bell,
4 524 F.2d 206, as where a higher court is providing a
5 construction of law to guide the future conduct inferior
6 courts. And even in that situation, it held that judicial
7 dictum is not binding on the court and therefore not binding
8 precedent. So at most I think we can say that Metromedia's
9 discussion of non-consensual third-party releases is
10 judicial dictum and therefore it is not a controlling
11 decision on non-consensual third-party release in general,
12 let alone when they're used to release the police power
13 claims of state governments.

14 Even the dicta in Metromedia leaves wide open
15 questions on whether third-party releases are permissible.
16 For example, whoever decides or even provides guidance on
17 when a non-debtor release steps over the line into what it
18 calls (indiscernible) of the bankruptcy process.

19 And it's significant that in the last paragraph of
20 its discussion about third-party releases, the Circuit
21 rejected the appellee's argument because the appealing
22 creditors received distribution under the plan from the
23 third party. They had no right to complain about the non-
24 debtor release. And it reasoned that the appealing
25 creditor's plan distribution was on account of their claims

1 against the debtor, not on account of their claims against
2 the non-debtor. That was at Page 143 of the decision. And
3 so it is here the distributions the states are receiving on
4 account of their claims against Purdue, not the Sacklers.
5 And that question was left open in Metromedia expressly in
6 the last paragraph that I just mentioned.

7 I think it's an even clearer case for
8 certification when you consider there is on Second Circuit
9 decision on the question of whether state governments can be
10 forced to release their police power claims against non-
11 debtor third parties via a third-party release.

12 At Page 141 of Your Honor's modified bench ruling,
13 you recognized that for many of the governmental objectors'
14 causes of action against shareholder-released parties, the
15 police power exception would apply.

16 But in deciding that those claims could be taken
17 away involuntarily by the third-party release here, Your
18 Honor did not cite any controlling Second Circuit decisions,
19 but decisions from other jurisdictions that police power
20 claims can be enjoined and that Congress's power under the
21 bankruptcy (indiscernible) of the Constitution overrides
22 police and regulatory power or state sovereignty. There is
23 simply no controlling Second Circuit decision on those
24 points of law, or certainly Your Honor would have cited
25 them.

1 There is also an open question in the Second
2 Circuit as to whether the bankruptcy court has core
3 jurisdiction and the Constitutional authority
4 (indiscernible) the third-party release. I recognize that
5 Judge McMahon considered those issues (indiscernible). But
6 there still is no controlling decision in the Circuit --
7 from the Circuit, rather, on those points. And, indeed, the
8 only circuit to have resolved them was the Third Circuit in
9 (indiscernible).

10 THE COURT: Well, but Mr. Goldman, I think when
11 you read the cases applying 158(d)(2)(A)(i), they recognize,
12 as one would have to, that it is incredibly rare, and you
13 would never be asking for a direct appeal in any event, if
14 you had a case exactly on point. And that's not how they
15 define a controlling decision. They define a controlling
16 decision as really controlling law, which may be supplied by
17 combining holdings from multiple cases. And there have been
18 no more number of opinions written since Stern v. Marshall I
19 think in the appellate area on Stern v. Marshall. And I
20 just -- I think to define controlling law that narrowly
21 would again open the door in a way that neither the statute
22 nor the circuit has said it should be opened.

23 Similarly, courts have said that it doesn't
24 warrant certification for direct appeal where someone says
25 there is not a decision that has adopted your position

1 that's open. I mean, I just think there are plenty of
2 course that say that. Novel arguments do not make
3 controlling precedent any less so.

4 So the statute has narrow exceptions for police
5 power. And it just seems to me that to put it into
6 (d) (2) (A) (i) as opposed to maybe one of the other
7 provisions, maybe the last one, is going to open the door
8 where courts almost uniformly have closed it.

9 I mean, there has been litigation in the Second
10 Circuit over third-party releases and injunctions since the
11 1980s. And it's not like the wave of certifications when
12 (indiscernible) came out to interpret the new provisions of
13 (indiscernible), as Colliers predicts would happen every
14 time the Bankruptcy Code is amended in a meaningful way.

15 So I guess I would push back a little on what
16 you're saying. I understand these issues are important.
17 And I also understand I believe they will get to the Second
18 Circuit. It's just, again, whether it warrants a direct
19 appeal that's really what's before me.

20 MR. GOLDMAN: I hear what you're saying, Your
21 Honor, but I think that could leave us falling into the
22 public importance category given the proliferation of third-
23 party releases and the constitutionality after Sterns v.
24 Marshall.

25 I think there is also a compelling issue based on

1 the Jevic decision which holds that Section 105 can't be
2 used when there is a (indiscernible) statutes such as 249,
3 which allows the court to dismiss a case and (indiscernible)
4 certain provisions for cause, which it held was not
5 sufficiently implemented in that case.

6 And here there is a similar issue with Sections
7 1123(a) and (b)(6). They are very vague statutes, but they
8 are being relied upon here as a means to say that third-
9 party releases are permissible under the Code. And I think
10 there is an equivalence there to what the Court held in
11 Jevic. And so I think for that additional reason, a direct
12 appeal is supported.

13 I think, finally, I would just conclude with
14 observing that as the U.S. Trustee pointed out, the factor
15 settlement agreement mandates that the debtors would move
16 themselves to direct certification. So obviously the
17 Debtors and the Sacklers considered any challenge to the
18 third-party release to be suitable for a direct appeal. Why
19 they've changed course now I would submit is perplexing and
20 they should be held to their position as stated in that
21 settlement agreement which Your Honor approved stating that
22 there would be no amendment notwithstanding anything to the
23 contrary.

24 THE COURT: Well, that's a fair point. And,
25 frankly, I don't think either your objection or the U.S.

1 Trustees raised it, but you are raising it now, and I will
2 take that into account.

3 MR. GOLDMAN: Thank you, Your Honor. That
4 concludes my remarks.

5 THE COURT: Okay.

6 MR. GOLD: Your Honor, Matthew Gold. I just want
7 to briefly mention that our objection did mention the
8 Sackler settlement that this was contrary to and that the
9 Debtors (indiscernible).

10 THE COURT: Okay. Mr. Underwood, are you going to
11 speak?

12 MR. UNDERWOOD: Yes, Your Honor, if I may. Good
13 morning. Allen Underwood on behalf of certain Canadian
14 municipality, first nation creditors and appellants.
15 (indiscernible) this matter, I think it's apparent appeals
16 (indiscernible) process and jurisdictional issues related
17 (indiscernible) authority of non-Article III judges over
18 both U.S. sovereigns and foreign sovereign and release --
19 held release claims as to them by debtors. (indiscernible)
20 take that.

21 I want to pull back to 28 U.S.C. 158. I'm going
22 to lower my volume here, Your Honor, because I hear that
23 there's feedback. I don't know why.

24 The provision that I am interested in with regard
25 to 28 U.S.C. 158 is that the immediate appeal to the circuit

1 they materially advance the progress of the case.

2 First of all, this is a direct appeal that is
3 desired by a number of -- a substantial number of different
4 governmental entities. We now know that there is --
5 virtually no time is going to be lost by pursuing this appeal
6 to the Circuit. And the language that I want to focus on
7 within this provision is "advance the progress of the case".
8 And believe it or not, I actually believe that the direct
9 appeal has a basis to advance, materially advance the
10 progress of this case. Because as we sit here today,
11 although we have a confirmed plan, it is subject to appeal,
12 and it remains pending effective date and consummation.

13 There are some open issues I believe with regard
14 to this case and whether or not it may be consummated
15 ultimately at or near the effective date.

16 The first issue that I raise is one which was
17 raised in our papers, which is that the plan itself right
18 now is pending a motion for recognition in Canada. Now I
19 will cut to the chase. And certainly I -- at the risk of
20 quoting Your Honor, I believe you said on the record that at
21 the time of the decision, you did not believe whether or not
22 this case was recognized in Canada would effect Newco.

23 And when I went back and read that, I tend to
24 actually agree with that statement. What I don't know is
25 whether or not recognition in Canada materially impacts

1 whether the claim can be funded through the trusts in
2 Jersey. And that is an issue that was certainly the subject
3 of significant examination and documentation at trial.

4 As it stands right now, the motion for recognition
5 by the foreign representative of the Debtors is opposed by
6 the Canadian municipalities and first nations. The hearing
7 is scheduled for November 9th, 2021 in Ontario, Toronto
8 before Judge Conway.

9 At this point, we can at least presume that the
10 district court will provide us a decision by November 30th.
11 I can't predict whether or not the --

12 THE COURT: Well, I don't know if Judge McMahon is
13 going to rule from the bench. I don't think we should
14 assume that necessarily.

15 MR. UNDERWOOD: -- (indiscernible) to carry that
16 pending matter to a date after the appeal before the
17 district court is decided on November 30th, or perhaps to a
18 later date when the circuit makes a decision, if that is
19 that path which Your Honor recommends and which the circuit
20 accepts.

21 I personally think that given the multi-party
22 dispute here and the likelihood that whatever the case may
23 be with regard to a district court decision, some party is
24 likely to take a higher appeal beyond the district court,
25 which is going to further delay that -- potentially further

1 delay that recognition proceeding.

2 I think it's material to this that over the last
3 two weeks, I have openly -- twice openly requested of the
4 Debtors information as to whether or not they have sought,
5 the Debtors or the Sacklers in fact, have actually sought
6 the determinization of the court in Jersey as to whether or
7 not they can fund the plan as it exists today. I have also
8 asked how long they would anticipate it taking for a
9 decision to be rendered by the Jersey courts. And I have
10 also asked if they have not sought that determination, when
11 they intend to (indiscernible). I have received no response
12 to those questions which I brought to the Debtors twice,
13 copied on all parties in this case.

14 And I bring those questions to the Debtor because
15 I think it's a fundamental issue about this with reference
16 to progress, material progress in this case. And if they
17 cannot tell me that that application has been made and that
18 the (indiscernible) would approve the plan as confirmed, I
19 don't believe the plan can be funded. And that's a
20 fundamental program. And I think that is almost a sick joke
21 in the sense that we are arguing here about delay when that
22 delay could ultimately be immaterial if plan funding cannot
23 occur because of any number of different circumstances here.
24 And one of those potential circumstances could be a failure
25 in modification and recognition in Canada. So that is my

1 first point, Your Honor, effectively that appealing to the
2 Circuit may actually advance and (indiscernible) progress of
3 the case vis-à-vis a determination that may be critical to
4 plan funding. I have asked, I don't have a response of
5 whether or not it is critical to plan funding.

6 With regard to the other issue that I would like
7 to address, Your Honor, in terms of the -- in terms of the
8 Debtor's arguments with regard to the Canadian first nations
9 and municipalities appeals, they have yet still -- they have
10 made multiple pleadings to cite a case that states that the
11 Foreign Sovereign Immunities Act is not the exclusive path
12 for obtaining affirmative jurisdiction over a foreign
13 sovereign.

14 The Debtor has never effectively tried to suggest
15 that there is an exception to the Foreign Sovereign
16 Immunities Act that applies. And there are fairly clear
17 exceptions set forth in the statute. And there is
18 significant case law about this. In terms of that fact that
19 what the Second Circuit's position on all of this is, I
20 would say that the exclusive mechanism for obtaining
21 jurisdiction over foreign sovereigns is through the Foreign
22 Sovereign Immunities Act. And the citation of that is
23 Kirschenbaum v. 650 Fifth Avenue and Related Properties, 830
24 F.3d 107, 122 (2d Cir. 2016). And the quotation is, "The
25 FSI provides the exclusive basis for obtaining subject

1 matter jurisdiction over a foreign state."

2 Now, at the outset of this, I said that there are
3 jurisdictional constitutional issues related to these
4 appeals. And I think that that suggests that that provision
5 from Kirschenbaum when read with reference to 1334 suggests
6 that there if in fact a subject matter jurisdictional issue
7 that should be handled by an appellate court.

8 And so on that, Your Honor, I think additionally
9 with respect to Section 106 of the Code, there is no
10 question that 106 of the Bankruptcy Code does not apply to
11 U.S. tribal sovereigns. And I think it is more than
12 arguable that it does not apply to foreign tribal
13 sovereigns. But there is obviously a basis here, Your
14 Honor, for a good faith appeal to the district court. And
15 it is our belief that when we look at the good faith basis
16 of appeal, the weight of the appeal, the weight of the case
17 and the fact that determining these issues may actually
18 materially (indiscernible) the progress of this case, that
19 the request for certification, respectfully, should be
20 granted.

21 And I appreciate Your Honor's exceptional
22 dedication to this case. Thank you.

23 MR. HUEBNER: Your Honor, Marshall Huebner of
24 Davis Polk. I see that Ms. Isaacs has her screen on. I
25 don't know if she -- I believe she had said before she wants

1 to be heard on this motion. I assume that she is on the
2 side of the appellants. And so before the Debtors begin to
3 respond to the incredible array of brand-new things we heard
4 today that were not in anybody's papers, as well as what was
5 in the papers, I want to extend Ms. Isaacs the courtesy of
6 speaking first if she would like to.

7 THE COURT: Okay, Ms. Isaacs? Did -- I don't
8 think you filed a motion seeking direct appeal, so I'm not
9 sure I agree with Mr. Huebner. I am not sure what position
10 you want to take on this motion or whether there is a basis
11 to take any position.

12 MS. ISAACS: Your Honor, you are incorrect. I did
13 file an appeal. And I've --

14 THE COURT: No, I know you filed an appeal. I
15 know you filed an appeal. But this is a separate issue.

16 MS. ISAACS: Okay. And I have -- let me talk,
17 Your Honor. Because you keep interrupting everybody that
18 has spoken today. And I would appreciate your time and
19 effort in this, please.

20 THE COURT: Well, again, I have a question. And
21 you may think it's unfair, but I need to structure this
22 argument. I don't think you filed a motion seeking a direct
23 appeal. Right?

24 MS. ISAACS: This is because I was not advised of
25 anything that's been going on. I have not been given due

1 process or service in anything that's been going on since I
2 fired my attorney and came pro se into these proceedings.
3 Nobody, not Huebner, nobody has sent me anything. Give
4 minutes before these proceedings, I had to work with Ms. Li
5 to get the link to these hearings. They're unfair and
6 unjust and they're not impartial to the American people.
7 And this needs to stop.

8 THE COURT: Okay. I'm going to cut you off,
9 ma'am. If you haven't filed a motion before me, I'm not
10 going to hear this. I'm sorry. You have your right to
11 appeal, you have appealed. I will hear you on the stay
12 issues, but not on this motion. All right?

13 MS. ISAACS: Your Honor --

14 THE COURT: No, that's it.

15 MS. ISAACS: Your behavior --

16 THE COURT: I'm -- no. I'm sorry, ma'am. I am
17 not going to hear this. This is not a pulpit for anyone who
18 wants to speak. This is a particular motion where people
19 take positions on the motion on the time allotted and not
20 just randomly saying I haven't received due process.

21 So I will hear the objectors.

22 MS. ISAACS: Your Honor, it's incorrect that
23 (indiscernible) in the middle of us having a --

24 THE COURT: We're going to cut if off. I'm sorry.
25 You can come back on. We will put you back on when we get

1 to the pretrial conference on the motions for stay. If you
2 were in the courtroom, the marshal --

3 MS. ISAACS: Please have them stop --

4 THE COURT: If you were in the courtroom, the CSO
5 would take you out, Ms. Isaacs. This is a courtroom, and I
6 am not going to delay this on this basis. You don't have
7 standing on this motion, which is a discrete and narrow
8 legal issue.

9 MR. HUEBNER: Your Honor, for the record, Marshall
10 Huebner of Davis Polk for the Debtors.

11 First, with respect to Ms. Isaacs, Your Honor,
12 just to help her and all the pro se claimants who I do
13 believe have gone to extraordinary lengths to try to
14 facilitate access, there are three -- there's totally free
15 instant access to the docket 24 hours a day, seven days a
16 week for all parties on the Prime Clerk website. I believe
17 that the hearing information is posted on those as well.
18 It's not actually our obligation to serve all of the
19 hundreds of thousands of parties individually for every
20 single motion. These aren't even our motions. This is
21 actually someone else's motion to which we are objecting.
22 And I just want to be clear, as an objector to someone
23 else's motion, the motion that we have to tell every
24 claimant in the case about the motion is just not a burden
25 that could fairly be put on us.

1 Your Honor, as I said a few minutes ago, a
2 dizzying array of brand-new things that were in nobody's
3 papers, both cases and alleged facts, which are wrong, and
4 the like were told to you. And so I am going to be I think,
5 with apologies, a little bit less organized than I try to be
6 just because I was essentially hit with a brand-new set of
7 arguments that nobody ever made.

8 And there are great answers to all of them, Your
9 Honor, and I will get to all of them, including your factual
10 question as to which parties were guessing at the answers,
11 and they were wrong. And I have facts that I think will
12 probably be helpful to the Court.

13 Your Honor, let me begin off-script before I do
14 anything else about the U.S. Trustee's repeated citations to
15 Judge McMahon.

16 So, Your Honor, let me sort of express where we
17 are procedurally. We obviously have enormous respect for
18 Judge McMahon and are delighted to be before her. And we
19 are gratified that she actually adopted our proposed
20 schedule for the briefing of the appeal because we want it
21 briefed and heard before we emerge. And that is an
22 extremely important point.

23 But, you know, for U.S. Trustee to cite Judge
24 McMahon's views expressed at a scheduling conference needs
25 context. The irony is the U.S. Trustee talks again and

1 again and again about due process, ironically, for people
2 who we don't believe exist, which are people with claims
3 against the Sacklers who don't have claims against Purdue.
4 And even if they did exist, those claims are not being
5 released under the plan.

6 But, Your Honor, here's what was before Judge
7 McMahon, and then I'm going to move on from this very
8 quickly. Despite knowing weeks ago that this Court was not
9 going to enter a bridge order, the United States Trustee
10 waited until last Friday evening, the business day before
11 the district court's scheduling conference, to hit us with
12 that total surprise 25-page emergency stay motion at the end
13 of the page limit, after Judge McMahon issued an order that
14 said no more letters because they had previously filed
15 letters seeking relief, which we took to mean no more
16 pleadings.

17 The only document before Judge McMahon at a
18 scheduling conference held on Tuesday was a U.S. Trustee
19 pleading that on every single page misstates the facts and
20 misstates the law.

21 THE COURT: But, Mr. Huebner, we seem to be going
22 a little far afield of what's before me. I don't know where
23 this is headed.

24 MR. HUEBNER: So, Your Honor, it's headed to
25 whether it's a pure question of law or not. They were

1 suggesting to, and in fact quoting from her that she has
2 already decided that these are pure legal issues. And
3 that's just completely false.

4 So let me just move on, Your Honor. That was
5 actually all I was going to say, which is there was a
6 scheduling conference where they had papers that they
7 ambushed us with that nobody else had time to respond to.
8 And Judge McMahon, based only on that, expressed some views.
9 That's not really relevant to today.

10 So let me just move right to the heart of the
11 matters.

12 Your Honor, Ms. Gold quite correctly began by
13 noting who was on the one side of this very important
14 contested matter. So let's take a minute and talk about who
15 was on the other side.

16 It has been confirmed to us that the Ad Hoc Group
17 of Hospitals, the Rate Payer Mediation Group, the third-
18 party (indiscernible) participants, and the Ad Hoc Group of
19 Public Schools have formally advised the UCC that they
20 support all the arguments (indiscernible) UCC.

21 So on our side of the V as it were, Your Honor,
22 you have the Debtors, the UCC, the AHC, which as you know,
23 represents multiples of the number of states of the
24 objectors and appellants as well as many others in the NDL
25 (indiscernible), the Multi-State Entities Group, the

1 personal injury claimants, the actual victims in this case
2 that others are somehow claiming to speak for, the NAS Ad
3 Hoc Group, the pediatric victims that others are claiming to
4 speak for, the hospitals, the public schools, the third
5 party payers, and the rate payers.

6 And so on one side, Your Honor, we have every
7 organized group in the entire case who have voted
8 overwhelmingly in favor of the plan. And on the other side,
9 we have approximately one on-thousandth, a little bit more
10 than that, of one percent of the creditors in this case,
11 about ten out of 614,000.

12 So, Your Honor, let's just go right to the
13 statute. Because you just heard a lot of oral argument.
14 And the most remarkable thing is that not one person cited
15 one case to you that actually addressed 158. And that's
16 because every single case that has addressed 158 on each of
17 the prongs is fatal on its face to the (indiscernible).

18 And why is that so? It's so important, Your
19 Honor, because you insisted that it be so. You did not
20 break new ground in confirming the plan. In fact, you
21 refused to. And you told the parties at multiple junctures
22 during the confirmation hearing, I am not going to prove the
23 current form of the releases because they will be reversed
24 because they don't satisfy Metromedia. If you don't fix
25 them, I'm not confirming the plan.

1 And not only did you do it all through the
2 confirmation hearing. Even after we thought that we fixed
3 them about four times, you still were not satisfied. And
4 you said not there yet. And in your actual ruling, you
5 pushed the releases even farther, well and unquestionably
6 within the scope of Metromedia. A lot more on that in a few
7 minutes. No new ground, no new law.

8 The second major assertion -- and just to say it
9 in plain English before I start citing case after case after
10 case -- is that the essential claim of the states is that
11 they are asserting claims for money damages and they want an
12 exemption from well-established law, Citing no cases and no
13 statute. They say merely because we are a government, won't
14 you please exempt us from existing law.

15 Now, that may or may not happen someday, and I
16 think it's totally unsupported by anything. I also think it
17 happens to be terrible social policy. But that's a
18 different issue. But asking to be exempted from decades of
19 well-established law, there is not world in which any court
20 has ever found that that is anything other than a failed
21 argument under 158.

22 In fact, the case law on 158 is quite clear that
23 novel and unsupported arguments attacking circuit law, which
24 is what the constitutional arguments do, or seeking to evade
25 it, which is what the supposed please give me an exemption

1 police power does, does not satisfy 158. Many people have
2 tried this before, which is why our brief is full cases.
3 And they've all failed.

4 But, Your Honor, it's so telling. I would ask you
5 when you have a moment to just look at the very line of the
6 U.S. Trustee's brief, the first sentence of their
7 preliminary statement. Because it says it all, and it's the
8 ultimate tell. The U.S. Trustee says that the appeal in
9 this case will resolve, and I quote, "The circumstances, if
10 any, under which Chapter 11 bankruptcy may extinguish non-
11 debtors' direct claims against other non-debtors." That's
12 how the U.S. Trustee described in their opening sentence the
13 question on appeal; are third-party releases inherently
14 legal?

15 But, Your Honor, that's the exact question that
16 was answered both very long ago and then again and again by
17 controlling Second Circuit authority. I mean, you know,
18 these quotations to Metromedia, I don't know if they think
19 they're only going to read their sort of cherry-picked
20 quotes from it. So let's talk about what it actually says.

21 "We have previously held that in bankruptcy cases,
22 a court may enjoin a creditor from suing a third party
23 provided the injunction plays an important part in the
24 debtor's reorganization plan." Citing Drexel, which goes
25 back to 1992. So they are reaffirming their previous

1 holding.

2 And I'm so glad that Mr. Goldman pointed you to
3 the last page before they (indiscernible). Because I have
4 all the cases, and I have all the right things circled. And
5 what the Second Circuit actually did after going through the
6 factors that we all use, even though it's not the question
7 of factors, is it said but in this case, there was no
8 evidence about the necessity of the releases. And in this
9 case, it was not proven that these were unusual
10 circumstances. And therefore, merely paying some money into
11 the estate doesn't justify you getting a release. We could
12 not possibly agree more and had about a hundred pages of
13 briefing on how the Metromedia holding and factors were
14 satisfied.

15 So as Your Honor has said to them again and again,
16 and they're just not listening, this has been the law in the
17 circuit for decades. Going back to Drexel, cited by
18 Metromedia as a holding, and to Johns Manville, which
19 addresses these circumstances.

20 Your Honor, when you strip away all the adjectives
21 and all the adverbs, they don't have nouns or verbs, because
22 this case is a straightforward application of Metromedia and
23 multipole, multiple predecessor and successor, which we'll
24 talk about in a few minutes, cases.

25 We respect the fact that the appellants think

1 Metromedia should be overruled. They are welcome to appeal.
2 We respect the fact that they think that you misapplied it
3 based on the facts of this case. They are welcome to
4 appeal. We understand that they are seeking a brand-new
5 exemption from existing law. They are welcome to seek that
6 from the circuit court. But that's not what 158 does.

7 In fact, as the cases say, let's talk about Zewdie
8 v. PNC Bank, 2015 WL 6007410. 158 is reserved for,
9 "exceptional circumstances in which the guidance of the
10 circuit court of appeals is necessary."

11 And, Your Honor, you've cited -- I don't know if
12 it's Weber or Weeber. The Second Circuit has told us,
13 "Direct appeal is most appropriate where it, the court, is
14 called upon to resolve a question of law not heavily
15 dependent on the particular facts of a case." Weber, 484
16 F.3d 158. Every ruling made by this Court after days of
17 testimony and thousands of pages of sworn evidence was
18 supported. And you tied it to the facts of this case. Which
19 is why, despite looking for weeks, we have not found any
20 confirmation order ever in the history of the Second Circuit
21 certified for direct appeal. Because as I will explain in a
22 few minutes -- citing cases to you, not making stuff up --
23 there are very obvious reasons why that is so.

24 So let's begin with prong one; is there
25 controlling circuit authority? So let me begin with the

1 U.S. Trustee's brand-new argument. Not in anybody's papers.
2 I'm not sure when it came to them, but obviously we will
3 deal with things as they arise, that somehow it's
4 disjunctive and you have to have both a supreme court ruling
5 and a circuit court ruling.

6 THE COURT: You don't need to cover that. That
7 just doesn't make sense. I mean, to give someone -- I mean,
8 remember, 1158(d)(2) is mandatory. It says shall. So the
9 idea of bankruptcy courts all around the country certifying
10 direct appeals to the courts of appeals whenever there is no
11 supreme court case on record is just -- it's nonsensical.
12 So let's just move on from that.

13 MR. HUEBNER: And, Your Honor, I'll leave it
14 except to say there is a reason no court has ever even
15 suggested that, because it would write the circuit court
16 right out of the statute. Because if you need a supreme
17 court, which obviously governs all of us, what's the point
18 of having it be or the circuit court. So it just -- again,
19 I have four arguments. I'll leave them aside if Your Honor
20 views it.

21 So now let's talk about whether Metromedia is
22 actually law or dicta. Your Honor, 16 years ago when
23 Metromedia was handed down, it was not a new ruling. It was
24 just another ruling in a line. Manville was in 1988,
25 reaffirmed in the nineties. Drexel was in 1992. But don't

1 take my word for it. As I quoted before, Your Honor, the
2 Second Circuit itself said we have previously held that.
3 And then it quotes Drexel, "for the legality in appropriate
4 circumstances of third-party releases," 416 F.3d 141,
5 quoting Drexel, 960 F.2d 293.

6 But of course Metromedia is not the last Second
7 Circuit decision, it's the middle one. Because it was
8 reaffirmed twice at the circuit level since 2005. In re
9 Bernie Madoff Investment Securities LLC, 740 F.3d 81, 93,
10 Note 12. And Pfizer, Inc. v. Angelos (In re Quigley Co.),
11 676 F.3d 45, 57. It there cannot be possibly be gainsaid
12 that these cases don't trigger 158(d)(1), which involves a
13 "question of law as to which there is no controlling
14 decision of the circuit court or the supreme court."

15 But, Your Honor, let me take a detour. Because I
16 do want to say it one last time, and then I'm not going to
17 say it again. Had the sixth or seventh or eighth amended
18 plan where the release were arguably much edgier -- and we
19 were prepared to defend them, but they were unquestionably
20 broader and edgier -- still been in the plan, the question
21 of whether this Court went beyond the contours of Metromedia
22 might actually make today a hearing where there was fair
23 things to say on both sides. But Your Honor refused to do
24 that. And you said it again and again, I'm just not doing
25 it.

1 So, Your Honor, if you look on Page 20 of the U.S.
2 Trustee's brief, as they're just fighting yesterday's war,
3 they allege that no controlling law exists because the
4 existing cases do not authorize "release of non-debtors'
5 direct claims of other non-debtors that are independent of
6 the debtor's own claims and property." That profound
7 misperception or misrepresentation has no relevance because
8 there are no such totally independent claims released here.

9 Rather, Your Honor found expressly that that was
10 not the case. What Madoff tells us is that "The touchstone
11 for bankruptcy jurisdiction over a non-debtor claim remains
12 whether its outcome might have a conceivable effect on the
13 bankruptcy estate." Madoff at Page 88, quoting Quigley.
14 Those are the claims being released here.

15 Your Honor specifically limited the releases of
16 the Sacklers to claims for which the "conduct, omission, or
17 liability of a debtor is a legal cause of legally relevant
18 factor." And Your Honor as a trier of fact found as a
19 matter of fact that the release claims against the Sacklers
20 have a direct impact on the estates and their property.

21 As you said in the bench ruling at Page 111, "I
22 conclude that the third-party claims that are covered by the
23 shareholder release under the plan, as I will further narrow
24 that release in this ruling, directly affect the
25 (indiscernible) of the debtor's estates, including insurance

1 rights, the shareholder release parties' rights to
2 indemnification and contribution, and the debtor's ability
3 to pursue the estate's own closely-related, indeed
4 fundamentally overlapping claims. And thus, the bankruptcy
5 subject matter jurisdiction to impose a third-party release
6 and injunction under the plan exists."

7 And, Your Honor, in the confirmation order at Page
8 30, you further found that the debtor's continued
9 unavoidable involvement in potentially thousands of lawsuits
10 against the Sacklers that are clearly all about the debtor's
11 prior alleged or actual misconduct -- they admitted to
12 multiple crimes -- unquestionably would implicate
13 (indiscernible) debtors.

14 So with their first argument that it's not dicta,
15 I mean, they're basically trying to overrule the Second
16 Circuit, which has made it clear multiple times that it is a
17 holding. Which is of course why if you were to ask them
18 what case ever anywhere in the world has ever said that
19 Metromedia is dicta, the answer is none. Because not only
20 did they say in Metromedia that it was a holding, they did
21 it later in Madoff where they said, and I quote, "In In re
22 Metromedia Fiber Network Inc., we held that a bankruptcy
23 court could permit the non-consensual release of creditors'
24 claims against third parties upon a finding of truly unusual
25 circumstances that render the release terms important to the

1 success of --" they use different words, but the underlying
2 bankruptcy plan.

3 So now let's talk about other cases. And then I'm
4 going to move on to point two. Judge Wiles in Aegean
5 Marine, which is a fabulous case for us in every way, says
6 that Metromedia commands -- his words, "Metromedia commands"
7 that third-party release may be granted in appropriate
8 circumstances.

9 In SunEdison, Judge Bernstein said Metromedia sets
10 the "requirements" for the third-party release, as does
11 Judge Peck in Charter Communications. Yet other cases so
12 holding, including Kirwan, Oneida, ResCap and
13 (indiscernible), are laid out in Paragraph 9 of the UCC's
14 brief.

15 So if the movants are right that Metromedia is
16 somehow dicta, it's going to be a pretty shocking piece of
17 news to the Second Circuit, which has said three times it's
18 not, and to every single court in this district ever to have
19 addressed Metromedia and said the contrary.

20 Point number two, Your Honor. And this is where
21 the "police power" comes in. So first of all, no one has
22 ever said that all of the states' claims for money damages
23 for past conduct are police power claims. Quite the
24 contrary. When we filed our injunction, one of our
25 rationales was even with an individual complaint by a state,

1 there could be some that are clearly police power, some that
2 might be police power, and some that we don't believe are
3 police power. And the parsing what was literally thousands
4 and thousands of individual accounts was unneeded and
5 impossible. But I don't think there was ever a ruling that
6 the state's claims for money damages for past conduct are
7 all police power. But it doesn't matter at all. Because
8 their next argument is that the fact that there is no
9 settled Second Circuit decision on whether every
10 governmental entity presumably in the world gets an
11 exemption from established law has already been ruled on
12 under 158 by cases on analogous types of arguments.

13 So let's call a spade a spade. What the movants
14 seek is a brand-new, plucked from thin air, bespoke
15 exception to Metromedia. They want to add a new factor that
16 says unless you are a government, in which case this doesn't
17 apply.

18 Leaving aside that this would leave any
19 governmental entity, no matter how large or small, no matter
20 how legitimate or illegitimate, no matter how unreasonable
21 their demands were. If there were 80,000 governmental
22 entities to one, that one set, I'm not doing a deal unless
23 you do X, Y, or Z because I have the power to stop this
24 plan. That's the rule of law they are looking for. And
25 it's not a surprise that they have exactly zero -- zero

1 cases, zero statutes, zero anything supporting their request
2 to be exempt from existing law.

3 But what we do have, Your Honor, is multiple
4 cases. So when you say, hey, I wish this were different for
5 me, you lose. In Paragraph 16 of our brief, the cases are
6 there. An attempt to seek a novel exception or loss on
7 well-settled law does not justify direct appeal.

8 In In re Goody's Family Clothing, 209 WL 2355705
9 at Page 2, the Court held, "The court need not conclude that
10 this case presents a question of first impression merely
11 because appellants have innovated a novel argument."

12 In In re Ladder 3, 2018 WL 22998349, the district
13 court rejected the movant's attempt to artificially
14 transform a simple application of 9019 into a legal question
15 and said, "There is no controlling decision addressing the
16 precise question... That's not because the legal question
17 is open, but because no one has made such an obviously
18 flawed argument."

19 With respect to Mr. Underwood's arguments, Your
20 Honor, first of all, he filed a joinder six days after the
21 deadline for the motions. If my memory is right, he's not
22 even allowed to make separate arguments that were not in the
23 main motions. All of this stuff about Jersey law honestly,
24 it just has no relevance today. We are all moving rapidly
25 and assiduously towards being able to close when allowed to

1 do so.

2 Again, I shouldn't have to address any of this
3 because this is all an ambush and improper under a joinder,
4 but on a motion that already was moving on shortened time.
5 But for the avoidance of doubt, Your Honor, his foreign
6 sovereign immunities claims were exactly what agreed to
7 confirmation, and Your Honor dealt with them completely and
8 definitively. No case has ever held that 106 does not mean
9 exactly what it says on its face, which is that sovereign
10 immunity is abrogated when you participate in a case. So
11 I'm going to leave Mr. Underwood sort of, you know, riffing
12 on his joinder on that motion to shorten time at that.

13 Point three, Your Honor. I only have to say the
14 sentence, but then I'm going to use a lot of case law.
15 Arguments that Metromedia was wrongly decided, and the
16 appellants believe it's going to be overturned either by the
17 Second Circuit itself or by the Supreme Court has been held
18 by many courts to not remotely trigger 158. Because 158 is
19 about the lack of controlling circuit decision. It's not
20 about displeasure with circuit decisions. And what they're
21 doing is they're expressing their displeasure that the law
22 in the Second Circuit and six other circuits is what it is.
23 And if some day they are granted cert, they are absolutely
24 welcome under our legal system to advance that argument to
25 the supreme court. But what they are not allowed to do is

1 pretend that it justifies 158.

2 So let's talk about that. So first of all, let's
3 just leave aside the audacity and hail Mary cubed aspect of
4 the appellants actually saying the Second Circuit got this
5 wrong five times, six other circuits got it wrong multiple
6 times, and that dozens of courts have been violating the
7 constitution literally for decades and only these appellants
8 have figured that out. Because even if they're right, that
9 goes in their cert petition. It's a dead loser under 158.

10 So first let's talk about -- and now I'm going to
11 tie back to the sort of attempted weaponization of Judge
12 McMahon, which I think was extremely inappropriate after the
13 ambush the U.S. Trustee pulled on many more governments who
14 are on our side than, frankly, are on theirs. It's just not
15 a pure legal issue at all. The question of whether due
16 process was provided hinges in no small part on the notice
17 and opportunity to be heard. That is an inherently and
18 intensely factual issue that turns on the notice provided, a
19 subject on which there was extraordinarily extensive
20 testimony, unrebutted, uncontroverted, and mostly
21 unchallenged at multiple hearings before confirmation.

22 And, Your Honor, you made detailed, factual
23 findings, including about the notice of the third-party
24 release claims. I think we all remember -- I think it was
25 Mr. McClammy holding up the print ads and the internet ads

1 and the plain English posters and the links to more
2 sophisticated notice and the ways that we spent literally
3 tens of millions of dollars. We spent more on trying to
4 give every American notice, with billions of hits, than most
5 bankruptcy cases involve. And this Court ruled on the
6 facts.

7 Page 115 to 116, "As far as the record before me
8 is concerned, notice of the confirmation hearing and the
9 plan's proposed third-party claims release satisfied due
10 process." Bench ruling at Page 113.

11 "Under the amended plan, it is now clear...that
12 only holders of claims against the debtors are being deemed
13 to grant the shareholder release, and it is equally clear
14 that...that holders of such claims receive due process
15 notice."

16 Second, Your Honor. If the movants were correct
17 in their claim that the third-party releases inherently and
18 forever violate due process because they're always illegal,
19 that means that 50 courts, including seven courts of appeal
20 have all been violating the constitution.

21 Your Honor, for the avoidance of doubt, the due
22 process laws of the Fifth Amendment is 230 years old. I
23 think it is a reasonable assumption that the seven circuits,
24 including the Second Circuit, knew about the existence of
25 the Constitution of the United States of America and the due

1 process clause as they ruled again and again that under
2 appropriate circumstances third-party releases are
3 appropriate.

4 Finally, Your Honor, Section 158's requirement of
5 no controlling circuit precedence becomes both a farce and a
6 nullity if you can satisfy it by saying, well, there is
7 controlling precedent, but it's wrong. Then there's no test
8 at all because all you have to do is say I think the circuit
9 got it wrong --

10 THE COURT: I actually don't think they're really
11 -- I don't think they've really been pursuing that argument.
12 I mean, I don't get that in the motions. But...

13 MR. HUEBNER: Okay. I'll leave it at that. If
14 you don't even view it as the argument, I don't need to
15 spend more time doing battle with it.

16 So, Your Honor, let me keep rolling then. We're
17 sort of about to start factor number two. So the question
18 on factor number two is what they are calling the public
19 importance factor. And again, it's just beyond telling that
20 you heard a lot of oral argument, and you asked a lot of
21 questions, and no one actually cited to you the many cases
22 that we all agree are the governing or relevant cases
23 because they are fatal to their claim.

24 So let me be very clear so there is no
25 misunderstanding. I have said probably more than any lawyer

1 in this case, because I am at the podium the most, for worse
2 or for better, that these cases and the plan are without any
3 possible doubt extraordinarily important. That's why we're
4 all so passionate, because the plan has the ability to
5 ameliorate, improve, and hopefully even save many lives,
6 holding thousands or tens of thousands to abatement programs
7 it is almost ready to begin funding with billions of
8 dollars.

9 But that's not the test under 158. It's not of
10 the case is of things that are important, and it's not even
11 whether the appeal's outcome is important. What courts have
12 held -- first let's talk about the standard. So all the
13 relevant courts have held that the -- and I'll just quote
14 it, courts "interpret the public importance prong narrowly."
15 See *In re Nortel Networks Corp.*, 2010 WL 1172642 at 2, *Jaffe*
16 *v. Samsung*, 470 B.R. 374. Because it's easy for lots of
17 cases to say big case, important case, famous case. Right?
18 That's not the standard.

19 Jude Scheindlin in *Mark IV Industries v. New*
20 *Mexico*, 452 B.R. 385, 388-389 explained, and I quote,
21 "Public importance exists when the matter on appeal
22 transcends the litigant and involves a legal question, the
23 resolution of which will advance the cause of jurisprudence
24 to a degree that is not usually the case." That holding has
25 been applied in every case that has articulated the

1 standard. Sabine, 551 B.R. 140; American Home Mortgage 408
2 B.R. 42; Springfield Hospital, 618 B.R. 109. And we'll get
3 to Springfield Hospital in a few minutes. We are delighted
4 they cited that case, because it actually proves, like all
5 the other cases that actually ruled on 158, why they lose.

6 And we all agree that this is the standard. The
7 U.S. Trustee put it at Page 20 of their brief, California
8 put it at Page 2 of their brief. It's not the importance of
9 the case or how it affects people, it's whether there is an
10 open legal question whose resolution by a circuit will
11 advance the cause of jurisprudence.

12 Your Honor, let's look at General Motors. Because
13 we were told a lot of things about it that were just flatly
14 not true. Because it's incredibly instructive. So, Your
15 Honor, you've asked the question during the case, which is
16 what was the timing of the Second Circuit in General Motors.
17 Davis Polk might have gotten it wrong, but is sure hope not,
18 because we went and got you your answer.

19 The petition for direct appeal was filed on June
20 18th, 2015. It was granted 83 days later. That's just the
21 petition on the 9th of August. The ultimate opinion was
22 rendered 391 days after the petition for direct appeal was
23 filed on July 13th, 2016. So, I don't know, maybe we've got
24 something wrong, but I don't think so.

25 Your Honor, the General Motors 158 opinion is

1 incredibly relevant and deadly on point. And it shows you
2 why they lose under prong two. We cited, Your Honor, in
3 Paragraph 23 of our brief and the MSGE discusses it at
4 length in Paragraph 14 of the brief. Almost exactly as
5 here, the GM objectors asked Judge Gerber to certify
6 (indiscernible). Many of us were involved in the auto cases
7 around the clock at that time. It is no exaggeration to say
8 that the survival of the U.S. auto industry was at stake and
9 the livelihoods and pensions and medical benefits for
10 hundreds of thousands of people as well as tens of billions
11 of dollars of U.S. and Canadian taxpayer funds.

12 But Judge Gerber correctly and un-controversially
13 distinguished between the importance of the case and of GM
14 from the "question of law presented". And here's what's
15 just so important about the case. He concluded that the
16 legal question was not a matter of public importance that
17 merited direct appeal because "Many people would agree that
18 GM's wellbeing is a matter of public importance." But then
19 he went on to say the legal question was not an issue of,
20 quote, public importance because it had already -- sorry,
21 that's not a quote. Because exactly as here, the issue had
22 already been decided by the circuit. And quote -- this is a
23 quote, "Deciding it again was not a matter of public
24 importance."

25 The final attempt by the movants, Your Honor, to

1 shoehorn themselves into public importance where they just
2 don't fit, is an argument that the third-party releases
3 themselves are an important issue. But again, they're
4 simply attempting to attack existing circuit law. What the
5 158 prong two cases say, there has to be an open question
6 below the circuit level on which new circuit law guidance is
7 needed to advance jurisprudence. Having the Second Circuit
8 overrule itself cannot possibly meet that standard. That's
9 not new guidance on an unresolved issue.

10 And in Millennium, by the way, just to get even
11 more focused, Judge Silverstein specifically concluded that
12 the legality of non-consensual third-party release in
13 bankruptcy cases is not a legal issue of public importance
14 under this prong despite being exactly as here,
15 "unqualifiably important to parties". Millennium Lab
16 Holdings II, LLC, 543 B.R. 703, 716. So we have case after
17 case saying you lose public importance if the circuit has
18 already ruled. Or even on cases saying that this exact
19 issue doesn't satisfy the process.

20 So, Your Honor, let's look at Springfield
21 Hospital, which sort of is their only case on public
22 importance. Because there too, they just seem to keep
23 forgetting that you read every case if you read them all
24 cover to cover, and you actually understand what they
25 actually say.

1 What happened in Springfield Hospital is that
2 COVID happened, and the CARES Act was passed, and PPP was
3 put in. And there was a novel question that had not been
4 answered by the Second Circuit about whether or not Chapter
5 11 debtors were eligible or ineligible for healthcare
6 programs under the CARES Act. That's a perfect potential
7 use of 158, new statutes, new issue, never been ruled on.
8 You know, one side argue, well, but it's about to sunset.
9 The other side said no, we're in a terrible national crisis,
10 it might get extended, people need to know whether debtors
11 can get PPP CARES Act funds or not. In that case, which,
12 again, it's all right there in black and white, agreed that
13 the public importance prong under 158(d)(2) is a high bar
14 for certification. And like all the other cases, they cite
15 Mark IV, Sabine, and Millennium for the demanding standard
16 they don't come close to meeting. And Jaffe v. Samsung,
17 which they quote for the proposition, and I quote, "There is
18 no question that 158(d)(2) should be involved only in narrow
19 circumstances," id at 117, quoting Jaffe.

20 So, Your Honor, these cases are very, very
21 important. But that just is not relevant at the end of the
22 day to 158(d)(2) by which many courts have ruled.

23 Prong three, Your Honor. Do these cases require
24 reconciliation of conflicting authority? I'm going to cut
25 this short because I think that Your Honor already basically

1 did exactly what I was going to do. And to be candid, it's
2 actually very dispiriting to me to see a division of the
3 Department of Justice in a major state represent what cases
4 do and don't say to a federal court in ways that are just
5 unsupportable. Interestingly enough, even the appealing
6 states, who don't hold many punches back, couldn't bring
7 themselves to advance this argument. They dropped a
8 footnote that just says in like five words, you know, maybe
9 prong two, footnotes one. You know, no explanation, no
10 color.

11 The notion that there is an intra-circuit conflict
12 within the Second Circuit is just completely and totally not
13 credible. They cite a grand total of two cases. Do those
14 cases conflict with one another? No. Do they say they
15 conflict with one another? No. Do they say I think Judge
16 Wiles got it wrong, I respectfully disagree with Judge
17 Bernstein? No. Did they refuse to apply Metromedia? No.
18 What did they actually do? Judge Wiles said, "As commanded
19 by the Second Circuit in Metromedia," and then went on to
20 say you can impose third-party releases in appropriate
21 circumstances. He definitely took issue, and I agree with
22 him passionately and completely, that people -- some people,
23 not us -- have started to treat third-party releases as "no
24 big deal" and they don't present evidence. And in that
25 case, there was no evidence that if the release claims were

1 not released, that would undermine the restructuring.

2 Here, we had about a thousand pages of
3 declarations and days of trial that there could be no
4 restructuring without these releases in large part because
5 of the other dozens of intercreditor deals in which these
6 very movants insisted in Phase 1 mediation that there be a
7 Sackler settlement or else there was not public-private
8 deal.

9 So in our case, which probably had the most
10 intensive trial on third-party releases ever, not only was
11 it proved beyond (indiscernible) that the claims would,
12 quote, undermine the plan if they weren't settled, but there
13 would be no plan. It would be obliterated.

14 Then of course there is SunEdison. Somehow -- and
15 again, you asked them for the quote. Of course there is
16 none because it's just totally a misrepresentation of the
17 case. SunEdison, like Aegean Marine, simply applied
18 Metromedia to the facts before it. That's what trial courts
19 do. They take the law, and they say you give me the facts,
20 let's look at the law, and then I rule.

21 And not only that, but in SunEdison, after finding
22 that they failed to justify any conceivable effect on the
23 estate, the judge even said if you want to submit a modified
24 form of release that does come within Metromedia, go ahead.
25 You simply did it before the ruling and said if you don't

1 fix these, I'm not ruling at all. And then they were fixed.
2 So the notion that there is an intra-circuit dispute based
3 on the only two cases any party cites, both of which agree
4 with each other and actually reach very similar conclusions
5 in applying Metromedia to their facts is really shockingly
6 unsupported as a claim.

7 Finally, Your Honor, there is the question of
8 whether a direct appeal will "materially advance the
9 progress of these cases". Here also, Your Honor, it's
10 amazing to me that someone can get up and make a legal
11 argument to a court and not cite a single case where case
12 after case has interpreted and addressed this prong. So
13 let's actually go to the law.

14 Their first claim that we want to end up at the
15 Second Circuit so you should let us -- or beyond. And I'm
16 going to talk about that in a few minutes. But they
17 certainly don't intend to stop based on everything they have
18 said so far, including on Tuesday.

19 Their first argument is we'd like to go to the
20 Second Circuit eventually, so let us go there first and
21 won't that save some time. We'll talk in a few minutes
22 about whether it will save time, because it most assuredly
23 will not. The argument loses the minute the question is
24 articulated. As Judge (indiscernible) ruled in Manville,
25 and I quote, "If valid, the argument would eliminate appeals

1 to the district court, contrary to the statement by the
2 court of appeals that the normal appellate process should
3 proceed so that the court of appeals is provided with the
4 views of the district court to aid in the fair decision of
5 the appeal."

6 Citing Weeber, Your Honor, exactly as you did, 484
7 F.3d 160. "Congress was aware of the dangers of retrying
8 the district court in the appeals process and probably
9 recognized the salutary effects of allowing some cases to
10 percolate through normal channels." Manville, 449 B.R. 31,
11 34 (S.D.N.Y. 2011).

12 Then there is the Lehman case, which addresses
13 their argument and dispenses with it. In Lehman as well,
14 the movants have apparent aspirations to take the case to
15 the Second Circuit and beyond. And the Lehman court said
16 that this would, and I quote, "If the mere expectation of
17 advancement to a circuit court was sufficient to establish
18 material advancement, Section 158(d)(2)(A) would effectively
19 eliminate the district court from the bankruptcy review
20 process altogether." In re Lehman Brothers Inc., 2013 WL
21 5272937 *5.

22 But then, Your Honor, let's pretend for a minute -
23 - let's just pretend that the law says I think I can go
24 faster if I just skip the district court so would you let me
25 just go faster, it definitely does not say that. Not even

1 close. But even if it did, they still would lose. Because
2 given where we already are, there is no question that direct
3 certification would still be appealed down probably by
4 months and impose terrible, utterly avoidable costs and harm
5 on all parties.

6 As Your Honor knows, Judge McMahon has been
7 assigned the appeals. In her words, she put the appeal on a
8 "Rocket docket". Appellate briefing is commencing on
9 October 22nd, concluding on November 19th. Oral argument is
10 scheduled for November 30th, and she intends to rule
11 expeditiously thereafter.

12 The U.S. Trustee basically admitted -- I think she
13 said it three times -- that there is a distinct possibly,
14 it's very likely that Judge McMahon will already have ruled
15 before the Second Circuit even decides whether or not to
16 take the case, let alone then having a second round where we
17 ask for expedited briefing and then having briefing, and
18 then schedule an oral argument, and then having oral
19 argument, and then waiting for a three-judge panel to
20 coordinate and rule. Any argument that the Second Circuit
21 is going to get us to a decision on the merits on the appeal
22 faster than what looks to be early to mid-December is
23 completely, completely not credible.

24 And that's why Judge Toto found that thinking
25 you're going to move faster by just skipping a step -- and

1 the Second Circuit in Weeber said not happening. Which is
2 why, Your Honor, it's very likely that this helps explain
3 why no confirmation order to our knowledge has ever been
4 directly certified.

5 THE COURT: So the statute says in 158(d) (2) (D)
6 that the appeal at the district court level proceeds until
7 the circuit court takes the -- if it decides to take the
8 certification. So the U.S. Trustee says well, then we can
9 have the best of both worlds. Judge McMahon, who is I think
10 probably not likely to lay down her pen, would keep working.
11 And then the circuit would be that much faster along because
12 there would be a request for a direct appeal.

13 I understand your argument about, well, we can't
14 set up precedent that just says if speed is important, then
15 it always goes to the circuit. But what is your response to
16 the U.S. Trustee's point that you can have the best of both
17 worlds?

18 MR. HUEBNER: Sure. Your Honor, it's not actually
19 the best of both worlds at all. The best of both worlds is
20 for the existing appeal to be argued as if it were an
21 existing appeal. And then there is a decision of a district
22 court that requires no special extraordinary extra round of
23 decision-making under a statute that is supposed to be
24 invoked very rarely under extraordinary circumstances.

25 I think there is a very good argument -- I try not

1 to make stuff up on the podium, but I think there's a very
2 good argument that we actually get to the Second Circuit
3 faster if we actually have a normal appeal and it is ruled
4 on with extraordinary speed which Judge McMahon is being
5 remarkable about. And then we all go together if that's
6 where we are.

7 Look at the facts I gave you in GM, Your Honor.
8 It took them 83 days just to rule on direct certification.
9 They will already have well before then I would think based
10 on what Judge McMahon has said so far in appellate decision
11 -- and by the way, Your Honor, I'll give you another great
12 answer which is totally different. One of the appellant's
13 ground for appeal, which we actually think is frivolous, is
14 the Stern v. Marshall issue, which is that you need an
15 Article III judge and not an Article I judge.

16 Here's another great reason. Because skipping the
17 district court harmed the case grievously if that argument
18 is found to be meritorious. Because if the Second Circuit
19 finds that, they have to remand it for further proceedings.
20 If the District Court finds it under amending standing order
21 of reference, M10-468, S.D.N.Y 2012, they are actually
22 allowed, I think it's a directive maybe, to treat any
23 rulings of this court as proposed findings about conclusions
24 of law. And so actually if one of the arguments they love,
25 and we don't put stock in, that they're actually right, then

1 it's a fact that we get resolved (indiscernible) the
2 district court because there is no remand. The district
3 court can (indiscernible) and the circuit court cannot
4 (indiscernible). So that's just one of many reasons.

5 But again, Your Honor, the burden is not on the
6 respondent. The burden is on the movant to be granted
7 extraordinary relief available in only rare circumstances.
8 And they have the burden of proving that these cases would
9 proceed much faster, and the just have nothing except we'd
10 like to skip the district court because we'd like to go to
11 the circuit eventually, so why not go there first. And
12 there is a reason that no case has ever allowed that,
13 because all the other three prongs of 158 become a joke if
14 you can merely say I'd like to move fast. This is not
15 inefficient. And they're asking the Second Circuit to now
16 potentially start ruling on an innumerable number -- I guess
17 kind of a numerable number -- on some unknown but very high
18 number of direct certification motions.

19 And there is a reason no case has ever held this,
20 because it's wrong and because it would make a complete hash
21 of the actual requirements of 158, which are simply not
22 satisfied. I mean, I think at the end of the day it's kind
23 of that simple.

24 Your Honor, I guess there are a couple of other
25 things that were said that -- so let me just pause for a

1 minute, Your Honor. Does that answer your question?

2 THE COURT: Yeah, I guess so. I think the phrase
3 leaves a lot, I think, a fair amount to interpret. But you
4 needed to read it in the light of the other provisions,
5 158(d).

6 In the hospital case, I actually think that the
7 district court ruled again quite on the PPP issue before it
8 ever got to the circuit. And I think it died there. So
9 clearly a direct appeal certification doesn't stop an
10 appellate process. Some judges might conceivably put less
11 into it than they would if they knew they were going to have
12 to make a decision, but I don't think Judge McMahon would be
13 one of those judges.

14 But I guess the issue is that these points will be
15 raised in the future. And I guess any deviation from the
16 general logic of the statute has to be pretty well thought
17 out.

18 MR. HUEBNER: Your Honor, I would say one other
19 thing. Your point that there is a canon of construction
20 statutes for -- you know, designed to be read harmoniously to
21 give effect to each provision, right? I mean, the first
22 three prongs would really almost be erased if any time you
23 just thought you could move faster and --

24 THE COURT: No, I understand. So I guess the
25 answer to your question is I think you should move on to the

1 point which, I stand correct, was raised in the last
2 paragraph of the state's motion. I don't think in the U.S.
3 Trustee's motion, about the Sackler settlement agreement --

4 MR. HUEBNER: Sure.

5 THE COURT: -- and whether this litigation is
6 somehow a breach of that agreement.

7 MR. HUEBNER: So, Your Honor, the answer is, as
8 you might imagine, we are aware of what our settlement
9 agreement says. So let me explain it as follows.

10 The agreement was obviously negotiated and was I
11 believe filed on the docket well before the confirmation
12 hearing was underway, and certainly well before Your Honor
13 issued a great amount of guidance during the hearing and
14 great amount of further guidance in connection with the
15 ruling, including at the ruling itself, including directing
16 us not to change it.

17 The ethos of that provision without any question
18 is in fact getting to an appeal because, frankly, we have
19 never had a problem with them. And that's the other great
20 sort of unstated untruth, that somehow we are desperately
21 trying to avoid a layer of appellate review. That's wrong.
22 And that's why the U.S. Trustee's puzzlement is puzzling,
23 because we made our views quite clear.

24 We agree and in fact support -- who cares what we
25 think? We're just lawyers for the Debtors. But so that

1 there is no confusion, we fully agree with and support the
2 views of both this Court and Judge McMahon that this plan is
3 not getting mooted until Judge McMahon rules. Period, end
4 of story.

5 But that's because she already told us, which is
6 why it's so terrific, that she understands the tremendous
7 harm involved here in delay. The fact that like a half of
8 one percent of the creditors are trying to stop one of the
9 most complicated and overwhelmingly consensual plans in
10 history. Let's not forget, Your Honor, that 4,924
11 governments voted on the plan.

12 THE COURT: Okay. But let me -- do you have the
13 agreement of the people that need to agree on the settlement
14 agreement?

15 MR. HUEBNER: We do, Your Honor. I was about to
16 get there, Your Honor. So while kind of a waiver under the
17 document is unquestionably something in favor of the debtors
18 -- and clearly the court -- I can't imagine them to rule the
19 Sacklers are not allowed to waive any provisions that are
20 not in the state's best interest. You know, we are not
21 amending it because you told us you don't want to see it
22 amended again, this final document. But the answer is
23 absolutely. We of course would not be here today litigating
24 ourselves into a breach of the settlement agreement. It
25 goes without saying that in light of the Court's ruling,

1 which we did not know until September 1st, and the way you
2 ruled and the extraordinary use of the factual record, we
3 don't think direct certification is legally appropriate. We
4 don't think 158 is satisfied. We think it's an improper
5 abuse of a statute and we think it's not in the estate's
6 best interest because we have a judge who will rule and tell
7 us whether she shares your view or not that this plan was
8 entirely lawful. So the expedition provisions nobody wants
9 to move away from. We want this on a rocket docket, and we
10 were delighted that Judge McMahon adopted our briefing
11 schedule. We do have a waiver of the obligation to pursue a
12 direct appeal because it is wrong to do so and no longer
13 makes sense.

14 THE COURT: So you are representing that you do
15 have a waiver from the Sacklers of that provision?

16 MR. HUEBNER: Your Honor, the notion that I would
17 be here today asking you to enter a ruling that would then
18 breach the settlement agreement (indiscernible) piece of the
19 plan, obviously it goes without saying that is not right,
20 could never be right, et cetera. Of course we have a
21 waiver.

22 THE COURT: Okay.

23 MR. HUEBNER: And so, you know, that's why the
24 U.S. Trustee's puzzlement is -- I'm not sure what they are
25 puzzled about. We have a schedule before a fantastic judge

1 who understands the seriousness of these issues. What we
2 don't want to do is be GM, where we end up with a direct
3 certification and we wait 391 days for a ruling. I'm not
4 going to elaborate the consequences, the fee burn, the delay
5 in abatement, the delay in paying victims. You know, you've
6 heard views from many parties enough times about the
7 extraordinary pain and cost and harm of delay. So it's not
8 puzzling at all.

9 We have a court, the proper court, the court that
10 hears 99.9 percent of bankruptcy appeals and 100 percent of
11 confirmation appeals in decades of the Second Circuit. And
12 that's the court we should go to. And as we hope when that
13 court rules and Your Honor's, you know, six-and-a-half-hour
14 ruling is upheld on appeal, we will be ready to start
15 (indiscernible) and improving and saving lives with the
16 billions of dollars that 99 percent of the stakeholders,
17 every voting class, and 80 percent of the states themselves,
18 and almost all the voting creditors in the estates of the
19 objecting states believe is the right outcome. So we have
20 only one goal.

21 THE COURT: All right.

22 MR. HUEBNER: So, Your Honor, unless the Court has
23 any questions, that's all I have. I know that there are a
24 few other parties on our side who have different things to
25 say, but I think we're actually (indiscernible). But I'm

1 happy to rest on our papers, which I think were, you know,
2 hopefully complete and apprehensible on any issues that I
3 did not hit.

4 THE COURT: Okay, thank you.

5 MR. HUEBNER: Mr. Preis?

6 MR. BLABEY: Good afternoon, Your Honor. Can you
7 hear me okay?

8 THE COURT: Well, I have someone else on the
9 screen I think.

10 MR. BLABEY: All right, you can go ahead. Arik,
11 you can go ahead.

12 THE COURT: Mr. Blabey, did you want to go ahead?
13 I think Mr. Preis is frozen for a second.

14 MR. BLABEY: Yes, I can go ahead. Can you hear me
15 okay, Your Honor?

16 THE COURT: Yes.

17 MR. BLABEY: David Blabey from Kramer Levin
18 Naftalis & Frankel on behalf of the Ad Hoc Committee of
19 Governmental and Other Contingent Litigation Claimants.

20 Your Honor, we also submitted an opposition to the
21 request for certification. I think Mr. Huebner has covered
22 all the arguments against certification in a lot of detail,
23 so I will be very brief.

24 I think it's important to respond, as Mr. Huebner
25 did, just to one or two points raised by the United States

1 Trustee.

2 At the outset of their argument, the United States
3 Trustee had argued that the Debtor's position on
4 certification was puzzling since the Debtors and other
5 parties have previously stated that they are in favor of
6 moving these cases along. And I want to be clear that no
7 one is more concerned with an expedited emergence and with
8 the desire to begin abating the opioid crisis than the Ad
9 Hoc Committee is.

10 But the reason why we oppose the motions is
11 because we have concluded, along with the Debtors and the
12 Committee, that going through the district court represents
13 the best chance and the fastest possible emergency while
14 also accommodating the desire for appellate review.

15 Your Honor mentioned at the September 30th hearing
16 that those two interests have to be balanced and that there
17 is a sweet spot that can be achieved between them. And we
18 think that going through the district court is the best way
19 to hit that sweet spot.

20 I also wanted to just respond to the argument made
21 by the United States Trustee that the issues on appeal here
22 involve pure questions of law. As Mr. Huebner noted, Judge
23 McMahon's commentary on that was made after she had only
24 received briefing from the United States Trustee. And I
25 think that it's clear from the case law, including

1 Metromedia itself, that these issues are not purely legal
2 issues. Metromedia says that before granting a third-party
3 release, the bankruptcy court must make "specific factual
4 findings". And of course that's what the Court did here in
5 some detail.

6 So I think unless the U.S. Trustee is suggesting
7 that they don't actually disagree with the Court's findings
8 under Metromedia, then the appeals obviously involve
9 questions of fact.

10 And I think with that, Your Honor, I won't belabor
11 or repeat the points that Mr. Huebner did. But for the
12 reasons he has stated today and set forth in our brief, we
13 would also urge the Court to deny the motions. Thank you.

14 THE COURT: Okay, thank you.

15 MR. PREIS: Good morning, Your Honor. Can you
16 hear me?

17 THE COURT: Yes, I can. I can see you, too.

18 Okay, great. Good morning, Your Honor. Arik
19 Preis, Akin Gump Strauss Hauer & Feld on behalf of the
20 Official Committee of Unsecured Creditors.

21 Please tell me if at any point you can't hear me,
22 because this is the first time we're trying this. Okay?

23 THE COURT: Okay.

24 MR. PREIS: By agreement, Mr. Huebner argued most
25 if not all of the motion on behalf of the parties that are

1 objecting to the motion. I rise now only to address the
2 fourth point, which is whether the appeal will advance the
3 progress of the case, a point that you've been talking about
4 a little bit.

5 As Mr. Huebner stated and as the case law clearly
6 states -- for instance, see Johns Manville, 449 B.R. 34, if
7 this provision were to simply mean that bypassing the
8 district court and going to an appellate court would be
9 faster than having to go to the district court first, by
10 definition every case would be certified to the appellate
11 courts and there would never be any appeal to the district
12 court. We talked about that.

13 But that's of course not the case and not the
14 correct way to look at the statute. Rather, as Mr. Huebner
15 pointed out and we point out in our papers, one must look at
16 the facts and circumstances and whether bypassing second
17 circuit would materially advance the progress of the case,
18 not the progress of the appeal. And the facts of this case
19 in particular weigh heavily against direct certification.

20 Mr. Huebner already addressed the five or six most
21 important points here but let me just restate them before I
22 get to the main point. First, the district court has
23 already given us a very fast schedule and said basically
24 it's going to render its oral -- going to hear oral argument
25 in 46 days.

1 Second, there are fact-specific issues that the
2 appellants have sought to raise which will be reviewed by
3 the district court. And you've also talked about those
4 earlier.

5 Third, there is a jurisdictional issue that the
6 Appellants have raised, and which Mr. Huebner mentioned,
7 which if they are successful at the Second Circuit, will
8 result in going back to the District Court to cure it and
9 then back up to the Second Circuit.

10 Fourth, sitting here today, we don't know if the
11 Second Circuit would even accept certification.

12 Fifth, even if the Second Circuit accepts
13 certification, there is no assurance that they are going to
14 accept Judge McMahon's schedule or that they're going to
15 move in anywhere close to the alacrity of Judge McMahon.

16 Sixth, and something people kind of just passed
17 over, is if we go on the dual path that the Office of the
18 United States Trustee is recommending, we will have to --
19 they will brief in front of the Second Circuit a motion to
20 expedite or to certify, we will respond. They may have to
21 respond. We will then have oral argument, and then the
22 Second Circuit will make its decision. And if the Second
23 Circuit makes its decision right before Judge McMahon makes
24 her decision, then we will have wasted the estate's time and
25 money over the last month-and-a-half, where we already have

1 a district court ready to make a ruling on a very quick
2 schedule.

3 However, I did not just get up to echo a lot of
4 what Mr. Huebner has said or to lay some additional points.
5 Simply stated, everyone here talks about the need for speed
6 in this case. But the Office of the United States Trustee
7 wants this Court and all parties to take the risk that going
8 to the Second Circuit will not result in more expeditious
9 review in going to the Second Circuit -- in going to the
10 district court.

11 Putting aside that we believe that the case law is
12 squarely against them, taking that risk will result in more
13 delay and more time between now and the effective date.

14 And the appellants implicitly are downplaying the
15 slowdown of a few weeks or maybe a month or two. That's the
16 point I want to talk about, as it goes to the harm that will
17 occur if there is a slowdown in these cases. In other
18 words, that the cases are not advanced.

19 Yesterday, the CDC issued a press release stating
20 that the number of overdose deaths in the United States rose
21 in the 12 months ending March 2021 as compared to the 12
22 months ending December 2020. In sheer numbers,
23 approximately 96,000 people died of overdose deaths in the
24 United States in the 12 months ending March 2021, of which
25 approximately 72,000 were opioid overdose deaths.

1 Moreover -- and here is the significant part --
2 while opioid overdose deaths accounted for 71.1 percent of
3 all overdose deaths in the 12 months ending December 2020,
4 in contrast, opioid overdose deaths accounted for 75.2
5 percent of all overdose deaths in the 12 months ending March
6 2021. In other words, opioid overdose deaths constituted
7 almost 90 percent of the increase, while only being 75
8 percent of the overdose -- of all overdose deaths. Said
9 another way, we are losing the fight against the opioid
10 epidemic.

11 But the facts don't end there. There are some
12 other examples. Approximately 1,000 of 15,000 addiction
13 treatment centers have closed in the last 18 months. 54
14 percent of addiction treatment centers have closed programs,
15 and 65 percent have been forced to turn away patients due to
16 constraints placed upon them by COVID. 39 percent of
17 treatment organizations believe they could survive six
18 months or less as of September 2020, despite 52 percent of
19 such organizations reporting an increase in demand for --

20 THE COURT: Okay. I'm going to cut you off
21 though, Mr. Preis. I know the following. I believe that
22 the disagreement here is not over the need to respond
23 promptly as soon as possible to the opioid crisis, but
24 rather a difference of opinion on the interpretation of the
25 statute and how it would be implemented. And I don't think

1 the U.S. Trustee or any of the appealing states disagrees
2 with you that getting money out promptly is extremely
3 important.

4 They assert that they need to balance that with
5 their view as stated on appeal that the plan isn't the
6 proper way to do that. And that's really an issue for
7 appeal and an issue for consideration when one hears motions
8 for a stay pending appeal. But I don't think as far as this
9 motion before me is concerned there is a disagreement as to
10 the goal, which is to get a prompt appellate review. I
11 think it's really just about, A, whether the statute permits
12 what the movants want, and B, as a subset of that, whether
13 the movants are right that if the statute in its last prong
14 focuses on speed of appellate review, that a direct appeal
15 will result in that determination.

16 So I'm going to cut that part short. I know it's
17 incredibly important. I think it's more important for a
18 hearing on a motion for a stay pending appeal though.

19 MR. PREIS: Understood, Your Honor. And I will
20 then cut it short. I will just say the following. Everyone
21 again talks about the speed. But the movants effectively
22 want all of us to take the risk that they are right. That's
23 the point here, and that's what I was going to get to. And
24 with that, Your Honor, I have nothing further.

25 THE COURT: Okay, thank you.

1 MR. LIESEMER: Your Honor, may I be heard?

2 THE COURT: Sure, go ahead.

3 MR. LIESEMER: Jeffrey Liesemer, Caplin &
4 Drysdale, on behalf of the multi-state governmental entities
5 group. We also put in an opposition to direct
6 certification. A lot of ground has been covered this
7 afternoon with respect -- on the plan supporter side, so I'm
8 going to be very brief.

9 Your Honor asked the parties -- I took it as all
10 parties -- whether we had any signal from the Second Circuit
11 that they would move expeditiously. And my client group is
12 not aware of anything from the Second Circuit, and we all
13 know that Judge McMahon has set a full day oral argument for
14 November 30th. She is keenly aware of the significance of
15 this case and the importance of timing. And we have -- the
16 case has been -- the appeal before Judge McMahon has been
17 set on a fast track.

18 And the other point I wanted to make, Your Honor,
19 is that I think it's been established here that when Your
20 Honor rendered the bench ruling and confirmed the plan, Your
21 Honor wasn't writing on a blank slate. When Your Honor
22 approached the third party release, Your Honor applied
23 Metromedia. When Your Honor dealt with due process, Your
24 Honor cited and relied on Mullane and Motors Liquidation.
25 When Your Honor dealt with jurisdiction, Your Honor

1 interpreted Quigley. These are all Second Circuit and
2 Supreme Court cases, they are all controlling decisions, and
3 therefore, we don't believe that the movants have satisfied
4 the controlling decision prong or any of the other prongs
5 for the reasons stated in our opposition and what's been
6 said on the plan supporter side. Thank you.

7 THE COURT: Okay, thank you. And I did -- because
8 I read the other objections, I read your objection, and I
9 thought it was quite focused and clear, so thank you.

10 MR. LIESEMER: Thank you, Your Honor.

11 MR. SHORE: Your Honor, this is Chris Shore. May
12 I be heard briefly?

13 THE COURT: Yes.

14 MR. SHORE: Thank you, Your Honor. Chris Shore
15 from White & Case on behalf of the Ad Hoc Group of
16 Individual Victims. I have one observation and one
17 clarification of the record.

18 Clearly there is a narrative that's attempting to
19 be created, both in the papers filed in court and in the
20 press coverage of this and everything else that what Your
21 Honor did in this case was some extraordinary change of law.
22 And I think the direct certification motion is another
23 effort on the (indiscernible) to try to turn the
24 confirmation order, which Mr. Huebner has pointed out is
25 straight down the middle of existing law right now and turn

1 it into something extraordinary. And that's not helpful to
2 the process at this point.

3 And in order to make that point, you heard a
4 number of people wear the mantle of either a government
5 regulator or a government to say that they're out there
6 protecting the constitutional rights of their citizens which
7 are being deprived. That is not able to be squared with the
8 legal position they're taking and what happens in bankruptcy
9 court.

10 Their legal position is the third-party releases
11 are unconstitutional and depriving due process of citizens
12 or are not authorized by the statute. If that were truly the
13 case and they truly believe that, you would see the U.S.
14 Trustee objecting to every third party release. You would
15 see states intervening in bankruptcy cases, at confirmation,
16 to object to a third-party release of their citizens' claim.
17 That doesn't happen. This isn't about them protecting
18 constitutional rights or parties, it's their attempt to use
19 those constitutional rights to create a narrative that what
20 you did here is so extraordinary that this will be one of
21 the one in ten thousand (indiscernible) that gets directly
22 certified under the statute. And I think it's fair game for
23 Your Honor to take judicial notice (indiscernible) that you
24 don't have the United States Trustee objecting to every
25 third-party release either because it violates individual's

1 constitutional rights, or it is (indiscernible). And you
2 don't have states appearing every time there is a third-
3 party release to advance the position that their citizens
4 are being deprived of their (indiscernible).

5 Now, with respect to the clarification, the U.S.
6 Trustee has repeated in this Court and elsewhere that -- and
7 it sounds good -- it's not just that constitutional rights
8 are being violated, people's property is being taken away
9 without compensation. And you heard that today, that people
10 have Sackler claims and you, Your Honor, entered an order
11 which takes those claims away without compensation.

12 First -- and this is a point that the first words
13 out of Judge McMahon's mouth in questioning the United
14 States Trustee is what claims are we talking about.
15 Identify for me a claim that exists against the Sacklers
16 that is being released under the plan that is not either
17 duplicative of a claim against the estates, or is it an
18 estate claim itself? The U.S. Trustee was unable to do it
19 then. They are still unable to do it now. I keep asking
20 them to identify (indiscernible) hearing if it goes forward
21 when we try to balance (indiscernible).

22 But from our perspective, this is a policy point
23 over hypothetical claims that they say are being released.
24 But it is not true to say that the claims are being released
25 without compensation.

1 Counsel for the United States Trustee cited the
2 plan supplement to support her argument that says the plan
3 requires that nobody get paid (indiscernible) Sacklers.
4 That, again, sounds good, but not correct. I'll just cite
5 to Section 2(b)(1) of the non-NAS, the TDP. It says, and
6 this is an important word, "Claims will not be determined
7 based upon (indiscernible)." But the fact that the --
8 right? It doesn't say that you're not getting paid for it.
9 I just says when you're trying to calculate what
10 distributions will be under the TDP, it is without regard to
11 who caused the harm.

12 The fact that the determination of payouts is made
13 agnostic to where the harm comes from is not the same as
14 saying that the funds that are put there by the Sacklers are
15 not in payment in part for the Sackler claim. The
16 confirmation record is clear that the release of direct
17 claims against the Sacklers related to opioid use and the
18 release of the -- or the channeling of the claims against
19 the Debtors, was a sine qua non of the Sackler's agreement
20 to pay.

21 So it is incorrect, and from a third-party
22 perspective sensationally incorrect to say that the way the
23 plan works, and the confirmation order works, is that people
24 who have claims against the Sacklers are having those claims
25 taken away without compensation. It's just that all of the

1 compensation comes through the TDP, at least for the
2 individuals. And that in the determination of the payouts,
3 there is not going to be a specific allocation between
4 whether it was Mortimer Sackler who did it or Purdue who did
5 it, which of course is completely appropriate if we want to
6 get (indiscernible).

7 So that's all I have, Your Honor, unless you have
8 any --

9 THE COURT: Okay, thank you.

10 MR. HUEBNER: Your Honor, with huge apologies, Mr.
11 Shore, I actually missed a page of my notes. I just want to
12 take ten more seconds on that. Because the TDPs are
13 actually very clear. And in fact, Section 2(b)(2) of both
14 the adult and the NAS expressly state that any distribution
15 is deemed to be in satisfaction of essentially -- I'm not
16 going to read the whole language, it's a little bit techy.
17 But on both your claims against the Sacklers and your claims
18 against Purdue for exactly this reason. In other words,
19 there absolutely is compensation. We all know that the
20 funding to pay the TDPs is coming because of the public-
21 private splits, because of the Sackler fund. But again, all
22 of the states, including the appellants and movants, require
23 in Phase I mediation, and they know it. The money is only
24 coming in and only being split and only going to people with
25 claims against the Sacklers because there is a settlement

1 with the Sacklers that provides for the billions of dollars.
2 And they also know that, as this Court insisted, releases
3 are inextricably tied to claims against Purdue also. You
4 have to hold a claim against Purdue, be the holder of a
5 claim to do that.

6 Your Honor, two other very quick points. Number
7 one, I've got more data for you, because I know it's very
8 important to you. We think that the average time based on
9 what we saw just to get the first step from the Second
10 Circuit on direct certification is about three months. And
11 then when you add in briefing, oral argument, and ruling,
12 unsurprisingly, you get to the GM outcome where the first
13 step was about three months, but then in the end it was
14 obviously over a year until they ruled. It's just not
15 knowable because at each step there's unknown -- not total
16 uncertainty about delay, but it is months and months I think
17 is probably the best anybody could say.

18 Number two, Your Honor --

19 THE COURT: Could I ask, regardless of how Judge
20 McMahon would rule, would the appellants -- I'm sorry, would
21 the appellees -- and the appellants have already said they
22 would do this -- would the appellees promptly seek expedited
23 review?

24 MR. HUEBNER: So, Your Honor, I clearly can't
25 speak on the fly alone at home for what all the appellees

1 would do. I mean, I just can't. Obviously I could never do
2 that. I don't ever misrepresent things.

3 From our perspective fundamentally, as Mr. Shore
4 said, we think your decision is actually right down the
5 middle of the fairway. We expect it to be affirmed by Judge
6 McMahon. We certainly hope it will be.

7 And, Your Honor, in that respect, I do need to
8 take one thing that's of critical importance to me. We were
9 all wearing masks before Judge McMahon. And, frankly,
10 things were a little bit muffled. There is one thing in
11 Judge McMahon's ruling where she said the Debtors have
12 conceded that there is a substantial question going to the
13 merits. To be clear, we don't believe we made any such
14 concession, because we don't believe that to be true.

15 THE COURT: I'm sorry, I didn't pose my question
16 correctly. I'm not asking you to waive rights with respect
17 to arguments where you are seeking a stay pending appeal.
18 Take that out of the picture. Assume you have whatever
19 rights you have on that.

20 MR. HUEBNER: Okay, understood.

21 THE COURT: What I'm asking is different, which is
22 if there is an appeal and I guess a stay is granted, would
23 the Debtors, along with the appellants, seek expedited
24 relief from the circuit court?

25 MR. HUEBNER: Yes. So, Your Honor, it's sort of

1 like a triple advisory opinion. Right? There is a November
2 9th stay hearing we haven't had yet. But we intend both to
3 put on evidence, as is our right, and put the movants to
4 their evidence.

5 There is an opinion of Judge McMahon we have not
6 seen yet, and we don't know what it's going to say. And so,
7 you know, if the fundamental question is, you know -- and
8 I'll make it even more stark than you posed it. Do you
9 agree to continue to be stayed and not emerge as long as
10 anybody wants to keep going?

11 THE COURT: No, no. I'm not asking that. I'm
12 just asking will the Debtors, if there is an appeal, seek
13 expedited treatment of it?

14 MR. HUEBNER: Well, we wouldn't be the appellant.
15 So I guess the question --

16 THE COURT: Well, you might be. You might be.
17 She might rule against you and in favor -- so, again, I'm
18 not asking you anything about a stay. I'm not asking you to
19 waive any rights in respect to the stay. I'm just saying if
20 it's before the circuit court, I'd like to have an idea as
21 to whether, as the appellants have said, you would seek
22 expedited treatment without any waiver on stay rights.

23 MR. HUEBNER: Understood, Your Honor. Here's what
24 I would say. I have a client. This is not a simple
25 question. And, frankly, without knowing what Judge

1 McMahon's ruling says in either direction -- because you're
2 right, I don't even know if I'm the appellee or the
3 appellant. So to represent today on October X that on
4 December X I pledge today to do X or Y, I'm just not sure
5 that it's a question that I can answer, let alone that I
6 would be doing it given I may have been exposed to COVID and
7 I'm completely alone in my apartment right now. And I would
8 be doing it by guessing of what answer my client would like
9 me to give.

10 But, Your Honor, one last point on prong four,
11 which I actually thought was in some ways the easiest of the
12 four prongs. The case law says -- and I forgot to give you
13 this answer before -- that circuit courts are greatly helped
14 by district courts --

15 THE COURT: Right.

16 MR. HUEBNER: -- passing on things first.

17 THE COURT: Right.

18 MR. HUEBNER: And so since we know she's going to
19 pass on it first to a virtual one hundred percent certainty
20 before they would ever get to it, probably before they even
21 decide whether they're willing to get to it, the notion that
22 things should proceed in the ordinary course and that
23 extraordinary relief on which the cases all go against them
24 seems to us to be definitively the better view. So I
25 apologize. But one extra point I didn't make.

1 And on the Jersey issue, Your Honor, which Mr.
2 Underwood, in violation of (indiscernible) Paragraph 39,
3 raised totally -- not even in the papers. Just to give Your
4 Honor more comfort that we're not a bunch of idiots on our
5 end, the motion we understand from the A side of the family
6 was timely made to the Jersey court. I believe the hearing
7 was held on October 1st, and we have no reason to believe
8 that we would not be timely ready to emerge. So I'm not
9 really sure why that has any relevance. I'm not sure why he
10 was allowed to ask us random deposition questions in the
11 middle of a hearing that he's not even a movant on. But the
12 answer is the right answer. And hopefully that gives the
13 Court comfort that we all sort of know what we're doing,
14 trying to bring this thing to an ability to help the
15 American people.

16 So, Your Honor, with that, I'm going to for sure
17 go back on mute unless the Court has any questions for me.

18 THE COURT: Okay. Thank you. All right. We've
19 been at this for a while. I'll hear very brief response
20 from the movants. Maybe we should start with Ms. Eitel from
21 the U.S. Trustee.

22 MS. EITEL: Thank you, Your Honor. I appreciate
23 the time, and I will be brief. I want to hit just quickly
24 five or six points that have been addressed in the arguments
25 today.

1 The first is maybe not -- the other parties have
2 raised, but it's an issue have concern. Section 2.9 in the
3 shareholder settlement agreement. If you recall, during the
4 confirmation hearing, the United States Trustee expressed
5 concern that the document had not been signed and that under
6 the agreement itself, it was subject to being amended post-
7 confirmation. And the Court said once I sign the
8 confirmation order, that's it. That's the shareholder
9 settlement agreement.

10 So based on what Mr. Huebner said today, it sounds
11 like -- I mean, a waiver is nothing but an amendment by
12 another name. So I think we need to get some clarity on
13 that, when exactly was that shareholder agreement amended.
14 Was it amended after confirmation? And if so, is that a
15 violation of a confirmation order? I don't know because we
16 don't know when it happened.

17 THE COURT: I mean, that provision is there so
18 that the estate is not worse off, that the terms --

19 MS. EITEL: I understand --

20 THE COURT: It's not to protect the Sacklers. So
21 I think there is a difference between our waiver and
22 amendment.

23 MS. EITEL: Your Honor, fair enough. I will move
24 on. But I just wanted to raise it because this was an issue
25 of confirmation about the malleable shareholder settlement

1 agreement.

2 THE COURT: Okay.

3 MS. EITEL: Secondly, Mr. Huebner never addressed
4 what we raised about his letters to Judge McMahon. He told
5 Judge McMahon on June 16th the Second Circuit had never
6 squarely addressed these issues, and yet he argued to the --

7 THE COURT: I understand that point. But
8 ultimately I have to make this decision, not Mr. Huebner.

9 MS. EITEL: Understood, Your Honor. And here's
10 what I would say. I can't frame it --

11 THE COURT: And, by the way, Judge McMahon didn't
12 grant that request. And as she says in her letter, that's
13 after talking with me. So there's no estoppel here.

14 MS. EITEL: Oh, I understand, Your Honor. But
15 it's just it's interesting that the position in the summer
16 was it's not clearly addressed today, it's decades-old, cite
17 it, and there's not a problem.

18 But here's the legal issue, Your Honor --

19 MR. HUEBNER: Your Honor, I'm happy to --

20 THE COURT: Look, this is a real side point. So
21 let's move on from it.

22 MS. EITEL: So here's the critical point. Can a
23 bankruptcy court extinguish claims of one non-debtor against
24 another non-debtor consistent with due process? That's
25 never been considered or decided by the Second Circuit, and

1 that's the pure legal issue here. It's not dependent upon
2 the facts other than the fact that one may be a non-debtor
3 and the other is a non-debtor. But the rest of it is a red
4 herring.

5 Your Honor, third, Mr. Huebner said these people,
6 these claims don't exist. And I have two responses for that
7 --

8 THE COURT: Actually, you know what? I'm not even
9 sure that's right. I think GM, the Motor Liquidation case,
10 actually addresses that point. Because there was a specific
11 free and clear order, and they were focusing on what claims
12 were covered by that and what due process was involved. And
13 that involved a determination of notice.

14 MS. EITEL: But that was respect to 363. It
15 wasn't --

16 THE COURT: But it's --

17 MS. EITEL: But that's a statutory provision that
18 allows that to be done. There is no statutory
19 (indiscernible) entirely different.

20 THE COURT: But the point is the due process
21 point, not the underlying source. That's covered by the
22 Manville-Drexel-Metromedia line of cases. You are mixing
23 apples and oranges there I think.

24 MS. EITEL: Your Honor, I would just beg to
25 differ. But I know the day is long, and I've said my piece

1 on Manville, Drexel, and Metromedia, et cetera. But I would
2 simply say this. The third point is Mr. Huebner says these
3 people and these claims don't even exist. Well, if that's
4 the case, then it's really just a hypothetical release and
5 it's ineffectual. Strike the provision, appeal over,
6 problem solved. And secondly, I would note that in Aegean
7 Marine, Judge Wiles spent an entire paragraph talking about
8 I'm often asked to give these releases just to protect
9 people from nuisance claims. And he declined to do so and
10 said that would be highly inappropriate to do so.

11 So, you know, the Debtors can't have it both ways.
12 Either the Sackler family paid money to get released from
13 something that was a real threat and harm that they were
14 worried about or there's nothing that's being released as
15 Mr. Huebner would say so there should be no release. I
16 mean, there's --

17 THE COURT: But clearly -- look, there are claims
18 asserted by the 48 states and the District of Columbia and
19 governmental entities. Some of them are police power
20 claims, I think. Some of them are not, I think. I have a
21 much harder time -- and I think this is all that -- I don't
22 think was Mr. Huebner. I think it was Mr. Shore --
23 understanding the basis for individual claimant's claims
24 against the Sacklers. And this is really fundamentally a
25 question of bankruptcy law.

1 Interestingly, I asked that the parties address it
2 at the disclosure statement hearing because the U.S. Trustee
3 actually raised an issue as to what types of claim and the
4 basis for it would be covered by the proposed release at
5 that time. And I cited then -- because I thought everyone
6 should understand it and address and I'm going to cite it
7 now, although, it hasn't been addressed all this time and I
8 think it's important.

9 The second circuit has discussed the issue at
10 length as to the basis for claims by individuals against the
11 owners of companies based on the actions that they take as
12 owners or their ownership. It is discussed at length in in
13 Re Tronox Inc., 855 f3d 84 99-107 2nd Circ 2007. Of course
14 it goes back a lot farther than that in time and the Tronox
15 court discusses this case as well as many others. St. Paul
16 Fire and Marine Insurance Company v PepsiCo, Inc., 884 f2d
17 688 2nd Circ 1989.

18 So I think the only point that is being made here,
19 and unfortunately, it's not really being made for my benefit
20 but because I think people are being tired of pillar over it
21 in the press which is a shame because people shouldn't care
22 about those things, is that it really isn't that easy -- in
23 fact, it's exceedingly difficult -- for an individual to
24 assert this type of claim on his or her own behalf because
25 the case law is pretty clear that in most cases, it's a

1 claim that belongs to the Debtor's estate. So that's the
2 only point that I think Mr. Shore was making and I think you
3 better be prepared with an answer for that question when we
4 get to the hearing on stays pending appeal as to who --
5 whose interests you're representing.

6 I would raise that, and I think we will eventually
7 get to it -- the pre-trial conference -- on this point, but
8 it's an important point. But it's not important for this
9 issue.

10 MS. EITEL: Your Honor, (indiscernible). I just
11 make one point before I move on to the final which is, this
12 is way in which this case is extraordinary. The Sackler
13 family is directly --

14 THE COURT: Ma'am, the law is what it is. The
15 circuit has spoken on this issue repeatedly and I think the
16 people who claim that they were poisoned by environmental
17 contamination in Tronox would not put themselves second to
18 anybody by Kerr-McGee --

19 MS. EITEL: And I'm not suggesting that --

20 THE COURT: -- so let's just move off of this
21 point. It's really irrelevant to this issue.

22 MS. EITEL: Certainly, Your Honor. I was --

23 THE COURT: It is apparently not irrelevant to the
24 press but then again, they don't read the cases. You do, so
25 I expect you to address those cases when we get to the

1 issues of stay pending appeal. They do not necessarily
2 apply to the states. It's a different consideration.

3 MS. EITEL: Understood, Your Honor. Moving on to
4 the next point which, Mr. Huebner said that it was very
5 clear there would be no (indiscernible) in this or wouldn't
6 be mooted until there was a ruling by Judge McMahon, and the
7 subtext of that, Your Honor, is that what about the second
8 circuit? And --

9 THE COURT: I understand that issue, too, but
10 that's a stay issue, too, Ms. Eitel. It's an important
11 point, but I don't think it's an issue -- it's a peripheral
12 issue for this hearing. It's very important for the stay
13 hearing.

14 MS. EITEL: Understood, Your Honor, I just wanted
15 to point it out that we did not get the -- an answer. And
16 let me just simply close with, the four standards -- there
17 are -- as I mentioned, only one needs to be satisfied. A
18 lot of the argument today was directed towards somehow that
19 this is going to slow the case down or make it more
20 difficult. And I reiterate and urge that, these are
21 parallel paths, and it may be that the second circuit does
22 not accept the appeal once its board certifies it, but we
23 should give them that opportunity in a case of this
24 consequence, with a case with a discrete, legal,
25 constitutional issue that has never been squarely presented

1 to them before and see if the second circuit is interested
2 in ruling in the first instance. We may or may not get
3 there before Judge McMahon rules. We'll see.

4 Your Honor, I have no further remarks to offer,
5 and I thank you for your time.

6 THE COURT: Okay. Thank you.

7 MR. EDMUNDS: Your Honor, if I may --

8 MR. GOLDMAN: -- be heard?

9 THE COURT: Yes, but I think Mr. Edmunds was
10 first.

11 MR. GOLDMAN: Oh. I will yield to Mr. Edmunds.

12 THE COURT: Okay.

13 MR. EDMUNDS: Thank you, Mr. Goldman. Just very
14 briefly, Your Honor. Brian Edmunds for the State of
15 Maryland.

16 You've heard, you know, exhaustive arguments on a
17 bunch of grounds that, you know -- over anything the
18 appellees could think of, that they raised. And
19 essentially, it's like this. Do not certify under this
20 provision that allows for expedition because that will
21 actually make the course of this case go slower, and I don't
22 think there's any basis for that. But the second circuit
23 has the power to expedite it. It has the power to turn it
24 down.

25 The essential thing here is that the factors are

1 met and there may be other important cases, but if this case
2 is not one of those cases, what is? And this is a
3 quintessential case for direct appeal. The Court has
4 already recognized the important decisions that the Court
5 had to make -- the novelty of the issues that aren't
6 directly controlled by any precedent. There is applicable
7 precedent to be sure, but there's no decision of the second
8 circuit that has dealt with these precise issues or issues
9 of their importance in this context before.

10 And to the argument that somehow allowing direct
11 appeal will slow these proceedings down -- there's just no
12 answer. The statute is enacted to allow for the appeal
13 because it will speed it up, and if the second circuit
14 decides not to do that, it will, one -- Mr. Huebner just
15 offered a three-month average. I have no reason to disagree
16 with that. I think it can happen much faster if the second
17 circuit wants to. But there will be a decision from Judge
18 McMahon by then.

19 So what we're really arguing is not related to the
20 provision that exists that allows the appeal to be sped up.
21 And it's telling also that Mr. Huebner could not commit,
22 once it gets to the second circuit, to moving expeditiously
23 through the second circuit. We intend to do that under
24 federal rule of appellate procedure 2. We want a decision
25 as quickly as we can, and you've heard all the states at the

1 last hearing say that that is what they want. That is what
2 we are seeking.

3 I cannot interpret what Mr. Huebner and others
4 said today as anything other than an attempt, in the end, to
5 take an appeal that warrants certification and ultimately
6 delay or potentially delay its resolution when it could be
7 resolved faster.

8 THE COURT: Well, I think to be fair, it's not a
9 question of delay. I think it's a question of wanting to
10 preserve arguments against a request for a stay pending
11 appeal. I think all sides here want to have the most
12 expeditious emergence from bankruptcy possible except you
13 all want to have it through the entire appellate process as
14 expeditiously as possible and they are preserving their
15 arguments to have -- to say, one appeal is enough. Please -
16 - Judge Drain, please, Judge McMahon, please, second
17 circuit, deny a future request for a stay.

18 I really don't think, having heard Mr. Price, for
19 example, that anyone is looking to delay anything. They
20 just have a different view as to balancing a need for speed
21 versus preserving rights for a full appellate process.

22 MR. EDMUNDS: Well, Your Honor, the -- but the
23 only -- whatever party's intent think, you know, it's
24 critical that we move as quickly as possible. To not take
25 advantage of law that allows us to move faster because it

1 might not work out that way doesn't seem to be the way to
2 get to that end.

3 THE COURT: There's merit to what you say, Mr.
4 Edmunds. On the other hand, I actually don't think that's
5 what the statute contemplates, and the case law doesn't say
6 that either. I mean, otherwise, you'd always have -- you'd
7 always go direct appeal and there were people in Congress
8 that wanted that, but that's not what ended up in the
9 statute. But you guys on both of this issue have addressed
10 that point, I think, sufficiently.

11 MR. EDMUNDS: Thank you, Your Honor.

12 THE COURT: Okay.

13 MR. GOLDMAN: Your Honor, is --

14 MS. MORALES: Can I ask a question?

15 THE COURT: I'm sorry. Mr. Goldman's speaking at
16 this point.

17 MR. GOLDMAN: Thank you, Your Honor. I just --
18 I'll be very brief. I first want to thank Your Honor for
19 recognizing remembering the state's claims. There were a
20 number of complaints that were made part of the record.
21 Connecticut's on of them. I know there were a number of
22 other states that had claims -- pending claims -- against
23 the Sacklers under their unfair trade practices acts and so
24 certainly, they are detrimentally affected by the third-
25 party releases. And the question now is, as Your Honor

1 rightly pointed out, to the individual claimants.

2 But moving on to one argument made by Mr. Huebner,
3 I thought I heard him suggest that the state's argument that
4 it's impermissible for third-party releases to capture
5 police power claims, you know, was somehow contrived or
6 designed as a novel argument to argue for direct review.
7 But that argument appeared throughout the objections I know
8 of at least of Connecticut, Maryland, and the District of
9 Columbia as well as Washington and Oregon based on concepts
10 of federalism and the principle that the bankruptcy code
11 doesn't displace state's claims that implicate the public
12 health, safety, and welfare, and that is a point of law on
13 which there is no controlling laws -- the back and forth on
14 -- in the principal argument. And that's the only point in
15 response that I want to make.

16 THE COURT: Okay. Thank you.

17 MR. GOLDMAN: Thank you, Your Honor.

18 MR. GOLD: Your Honor, Matthew Gold, on behalf of
19 the parties identified previously.

20 THE COURT: Right.

21 MR. GOLD: Can you hear, and may I be heard?

22 THE COURT: Yes.

23 MR. GOLD: Thank you, Your Honor. I, too, will be
24 brief. First, I think Your Honor recognizes this, but I do
25 want to make it clear that the United States Trustee and the

1 appealing states, while the relief we've sought is
2 essentially identical on this motion, that the U.S. Trustee
3 has raised on appeal issues that are in many ways broader
4 than the ones that the states are asserting. And so many of
5 the arguments that have been heard before regarding and
6 essentially deal with the merits seem to apply to the issues
7 that the U.S. Trustee is raising on appeal but not
8 necessarily to the states' issues which as I said are more
9 narrow and really mainly focused on the non-Debtor --
10 nonconsensual releases being imposed on state police power
11 actions.

12 Second --

13 THE COURT: But Mr. Gold, where does that lead? I
14 mean, I -- one could logically infer from that that you're
15 suggesting that I certify a direct appeal of the states'
16 appeals and not the U.S. Trustee's and then we could be
17 having appeals in two different forums? That doesn't make
18 sense, right?

19 MR. GOLD: No, I am not -- it does not make sense
20 and I'm suggesting (indiscernible).

21 THE COURT: Okay.

22 MR. GOLD: I believe that the U.S. Trustee appeals
23 include the appeals that are being raised by the states --

24 THE COURT: Right.

25 MR. GOLD: -- and so that therefore, it would one

1 certification of a whole set of appeals which have been
2 consolidated on to the district court docket because they're
3 all appeals from the same order.

4 THE COURT: So even if there are a bunch of
5 appeals in front of a district judge and a lot of them don't
6 satisfy 28 U.S.C. 158(d)(2), they get to ride along with
7 those that do?

8 MR. GOLD: Well, Your Honor, that's an interesting
9 question and I understand that -- and I would say this. I
10 mean, I think the important point is that we have raised
11 issues that we believe unambiguously do satisfy the
12 standard. If the Court wants to parse and say that some
13 other issues do not and shouldn't be tagged along and aren't
14 subject to that, that's fine. But it's very common for many
15 issues to be raised and I don't understand the -- that the
16 standard under the statutes has to be that every issue
17 that's been raised has to fall within this rubric.

18 If there has to be a winnowing, I understand that,
19 but that should not preclude issues that -- where it's valid
20 for this to be done and where certification should be done
21 to not be certified because there may be other issues in the
22 case.

23 THE COURT: Okay.

24 MR. GOLD: The -- I will just briefly note that
25 Mr. Huebner went on at length and it is his -- and I trust

1 Your Honor understands that this attorney argument to a
2 claim that we are seeking an exemption from the law. We
3 have never said we seek an exemption from the law. We are
4 saying that we are dealing with a circumstance that neither
5 the second circuit nor any of the other cases, frankly,
6 dealing with nonconsensual third-party releases have
7 addressed. I think that the key word that Mr. Huebner used
8 repeatedly was "zero" and I think that that word very aptly
9 applies to the number of cases that have ruled either way on
10 whether nonconsensual third-party releases, as recognized by
11 some decisions, can be applied where the claimants are
12 states exercising their police powers.

13 Now, we can argue about whether -- the Debtor's
14 position is, well, a case saying that a bond holder can have
15 their claim released is the same as a state exercising their
16 police powers, so we have decisions in the record and that's
17 fair for argument. That's what parties do. But to say that
18 there's a controlling decision on that point, we maintain,
19 is a vast overstatement of how the law lays which -- and
20 that -- we believe that even we know that Your Honor
21 rejected our views in the ruling, I think you recognized as
22 you're going through it that the issues on these were more
23 difficult and less easy to come to than some of the issues
24 that were placed before Your Honor.

25 I will also add that the statements in front of

1 Judge McMahon -- and this was just two days ago, and I'm
2 really surprised to hear this argument about this being --
3 that this appeal involves legal issues -- was not simply a
4 matter of Judge McMahon reading the U.S. Trustee's papers
5 and riffing on them. The -- Judge McMahon very clearly
6 addressed the entire courtroom and said, it appears to me
7 that the issues on this appeal are entirely legal in nature,
8 and she was looking at that point not merely for purposes of
9 the stay motion but also for setting a briefing schedule in
10 terms of how the issues were going to be raised and how
11 extensive of reliance on the record there was going to be.

12 So she said to the courtroom, does anyone disagree
13 that these issues are legal in nature. Crickets. Complete
14 silence. Zero comments from any of the parties who are now
15 coming up and saying, oh, no, no, no. This appeal involves
16 massive factual issues. This appeal is -- there's no way
17 this appeal can be heard without all --

18 THE COURT: But, Mr. Gold, I mean, I -- first of
19 all, I don't have the transcript. I wasn't there,
20 obviously. And I guess the comments that you're making, and
21 that Mr. Huebner made go to the Court's interpretation of
22 the first factor that when it says, "the judgment involves a
23 question of law," they say a pure question of law.

24 But frankly, the due process issue is a factual
25 issue. Judge McMahon doesn't have to a fact-finder on that

1 issue, but it is -- there is a factual element to the issue.
2 It wasn't really contested by your clients, I don't believe,
3 as far as due process is concerned. So I guess understand
4 both of your points, but ultimately, not having been there
5 and not having the transcript, it's just not clear to me
6 whether this is helpful on this point.

7 MR. GOLD: Okay. Fair enough, Your Honor. I
8 won't --

9 THE COURT: And ultimately, it is more relevant as
10 far as some of the other issues which maybe she's not
11 addressing in that remark since the focus of the U.S.
12 Trustee was on the releases and Stern versus Marshall, et
13 cetera, and jurisdiction and the like. Those are primarily
14 pure legal issues. I understand that point.

15 There are some other issues that aren't
16 necessarily. For example, the merits of the settlement --
17 the Court's assessments of the settlement; the Court's
18 assessment of 1129(a)(7), those types of issues. So I'm
19 reluctant on a number of grounds to go off on this argument
20 you're making, a), because I wasn't there. I don't have the
21 transcript. B), I don't know what was really being
22 considered by Judge McMahon; and c), because I think that
23 for some of the points, I think there are basic legal
24 issues, but that's not dispositive for the question either
25 before me. And for other ones, I think they're mixed issues

1 of law and fact. So I guess enough said on that point.

2 MR. GOLD: Yes, Your Honor. The -- I will respond
3 briefly to a comment that Mr. Shore made which I believe is
4 simply a mischaracterization of the states' position. The
5 states have been I think very clear that the states act in
6 the court in their capacity as states in upholding the
7 rights and wellbeing of their citizens. That is not the
8 same as saying that those citizens have standing on their
9 own power to raise these claims. In fact, it's the opposite
10 -- is the states who come in and can assert arguments in
11 order to protect their citizens. That is why the states do
12 not come and effect on private citizens. They have a
13 release imposed upon them because that's a separate issue.

14 This -- what we are talking about here is the
15 instances where the states, seeking to protect their
16 citizenry through their police powers, attempt to act and
17 are now being deprived. And that is a -- really a narrower
18 question than the one that (indiscernible).

19 Your Honor, I have nothing further to add
20 (indiscernible). Thank you.

21 THE COURT: Okay. Very well.

22 MR. UNDERWOOD: Your Honor, (indiscernible)

23 THE COURT: Is someone -- I'm sorry. Someone has
24 been wanting to ask a question and since we're done with the
25 response by the movants, I think I'll let you do that. Oh,

1 I'm sorry. I didn't see you, Mr. Underwood. I didn't know
2 that you were going to respond. Ms. Morales, why don't you
3 ask your question and then we can go to Mr. Underwood.

4 MS. MORALES: Okay. I have a question about -- so
5 when I filed my summary judgment, the response wasn't --
6 they didn't respond with -- they just objected, and I don't
7 understand. Is that the answer I get? (indiscernible) like
8 they didn't respond to (indiscernible) they just objected
9 and (indiscernible) I guess I don't understand if that's the
10 final answer of their response. I mean --

11 THE COURT: Okay. Ms. Morales, I don't -- I'm not
12 quite sure which matter you're talking about.

13 MS. MORALES: Oh, okay. So I filed a summary --

14 THE COURT: No, no. I don't need you to explain
15 it to me. It's not on the calendar for today.

16 MS. MORALES: Okay, sorry.

17 THE COURT: It's not what I prepared on.

18 MS. MORALES: Oh, okay.

19 THE COURT: It's not what any of the parties on
20 the phone, on Zoom, prepared on. So I can't answer your
21 question.

22 MS. MORALES: Yeah. But is --

23 THE COURT: It's not what we should be doing here.

24 MS. MORALES: Okay. If I don't --

25 THE COURT: Okay. So you can raise it separately.

1 You can file some sort of pleading if you want. You can ask
2 the Debtors, but I -- we can't do it here at this point.
3 Mr. Underwood.

4 MR. UNDERWOOD: Yes, Your Honor, very briefly.
5 The Trustee's -- the Trustee filed a motion to certify on
6 October 1st. We filed our joinder on October 7th. I'm not
7 aware of any reason that the joinder shouldn't be heard.

8 Secondly, with regard to this question that has
9 been asked now three times, we still don't have an answer, I
10 don't believe, that was an effective answer to whether or
11 not plan funding can occur here. I don't think that's
12 material on terms of all the issues that we're addressing.

13 THE COURT: I don't understand how possibly it's
14 relevant at this point, Mr. Underwood, so let's move on. It
15 just isn't --

16 MR. UNDERWOOD: All right.

17 THE COURT: -- to this issue before me.

18 MR. UNDERWOOD: I mean, in terms of certification.

19 THE COURT: No. It's not relevant.

20 MR. UNDERWOOD: Okay. Would you suggest or think
21 that it's relevant with regard to the stay hearing that is -
22 -

23 THE COURT: We'll get to that if we ever get to it
24 today.

25 MR. UNDERWOOD: Okay. I appreciate it. Thank

1 you, Your Honor.

2 THE COURT: Okay.

3 MR. UNDERWOOD: I would only just add that I think
4 that the Debtor's reading of Section 106 is remarkably
5 facile considering --

6 THE COURT: Mr. Underwood, your client filed
7 proofs of claim in this case, right?

8 MR. UNDERWOOD: Correct, Your Honor.

9 THE COURT: You wanted the Court to decide how
10 your clients would get paid under a plan, I assume, right?

11 MR. UNDERWOOD: Correct.

12 THE COURT: All right. That's enough from me.

13 MR. UNDERWOOD: Thank you, Your Honor.

14 MR. HUEBNER: So, Your Honor -- two -- literally,
15 ten seconds. Number one, the number is not zero at all. I
16 guess Mr. Gold missed paragraph 15 of our brief where we
17 cite a seventh circuit case applying the third-party
18 releases to the FCC and a Delaware case applying it the
19 states. Those are right there in black and white, Paradigm
20 and Exxon. I won't read the pin sites.

21 With respect to Mr. Underwood, he should check the
22 CMO, paragraph 39, which bars joinder parties from making
23 arguments not in the movant's papers precisely for this
24 reason. Filing a joinder a few days before a hearing that
25 we never saw and making new arguments is a form of ambush

1 barred by the rules of this court. There is a limit to how
2 many things we can be fairly asked to respond to with no
3 notice on an ambush basis. At some point, rules have to be
4 followed.

5 THE COURT: Okay. I guess, so that Mr. Goldman
6 won't feel compelled to respond, I think all of those cases
7 are outside of the circuit, right, Mr. Huebner?

8 MR. HUEBNER: They are, Your Honor. His claim was
9 that no case has ever applied to third-party releases to
10 governmental entities.

11 THE COURT: Oh, yes.

12 MR. HUEBNER: And that is a false statement.

13 THE COURT: Well, no. I understand and he thinks
14 he's really -- as he should, at least -- confining it to the
15 statute that's in front of me today.

16 MR. HUEBNER: Correct, Your Honor. And that's our
17 point. We don't have to prove a negative. We're not seeing
18 extraordinary relief. They're trying to get an exemption
19 from existing law and there's just no justification for it.
20 And the two cases that have ruled on it have gone the other
21 way and that's all I have to say.

22 THE COURT: Okay. All right. Thank you. All
23 right. I'm going to take a brief break. I mean, literally
24 brief, like five minutes. So I'll be back at twenty after.

25 AUTOMATED VOICE: Recording stopped.

1 THE COURT: Okay. I'm sorry. Thanks. Okay.

2 Good afternoon, everyone. This is Judge Drain. We're
3 resuming in In re Purdue Pharma, LP, et al.

4 I have before me two motions that each seek the
5 Court's certification of a direct appeal, the Court's order
6 confirming the Debtor's Chapter 11 plan to the second
7 circuit. They are by the United States Trustee and by the
8 so-called appealing states. I have a joinder in the U.S.
9 Trustee's motion by a Canadian municipality and certain
10 Canadian First Nations.

11 The U.S. Trustee's motion also seeks, albeit very
12 briefly and without any real attempt to address the issues
13 raised in it, direct certification of its appeal from my
14 order dated September 15, 2021, that authorized the Debtors
15 to take certain preliminary steps to be administratively
16 ready to go effective on their plan when the conditions to
17 the effective date occur. Although the Canadian parties
18 joined in the U.S. Trustee's motion, obviously, that is not
19 an issue for them, and it was not raised by the several
20 appealing states.

21 The authority for a certification of a direct
22 appeal to the circuit court, i.e., bypassing the district
23 court in the normal order of appellate practice, is set
24 forth in 28 U.S.C. Section 158(d)(2). Subsection B of that
25 section states that if the -- any of the conditions for

1 certifying a direct appeal set forth in subparagraph A are
2 met, the Court shall make the certification described in
3 that subparagraph, i.e., this is not a matter of the Court's
4 exercise of discretion, although, of course, the district
5 court exercises some discretion in interpreting the statute
6 as applies to the appeals or appeal at issue.

7 The Congress set forth that the Court shall
8 certify a direct appeal if, (i), the judgment order or
9 decrees involves a question of laws to which there is no
10 controlling decision of the court of appeals for the circuit
11 or of the Supreme Court of the United States or involves a
12 matter of public importance. There's a common between
13 "United States" and the word "or." There's no comma between
14 the word "circuit" and the word "or" of the Supreme Court of
15 the United States in that subsection.

16 The Court shall also certify a direct appeal under
17 ii of this section if the judgment order or decree involves
18 a question of law requiring resolution of conflicting
19 decisions; or, (iii), an immediate appeal from the judgment
20 order or decree may materially advance the progress of the
21 case or proceeding in which the appeal is taken.

22 It is clear from the statute that while the court
23 where the appeal sits and for purposes of bankruptcy rule
24 8006 and 8002 and 28 U.S.C. Section 158(c)(2), it sits with
25 me for the purposes of these motions given the timing of the

1 orders which are subject to the appeal, the Court, as is
2 appropriate, has no power to compel the circuit court to
3 take the certification. That determination is up to the
4 circuit court in the exercise of its discretion. See,
5 generally, Weber, W-E-B-E-R, v United State Trustee, 484 f3d
6 154 2nd circ 2007.

7 This provision of the judicial a code was enacted
8 in 2005 as part of the BPACPA amendments and has been the
9 subject of substantial case law since then, not only at the
10 bankruptcy court level, but also at the district court level
11 since many of the requests for direct appeal have been made
12 at the district court level, as well as at the circuit
13 level. The Court takes primary guidance in resolving these
14 motions which are opposed by the Debtors, the creditors
15 committee, the ad hoc committee of governmental entities,
16 the multistate governmental entities group, and the ad hoc
17 committee of personal injury claimants, all of whom have an
18 interest as appellees in respect of the appeals from the
19 circuit's decision in the Weber case. In that case, the
20 circuit took guidance, first and foremost, from the language
21 of the statute; secondly, from the legislative history,
22 setting for the reasons why Congress passed the statute; and
23 in jurisprudential considerations.

24 I want to emphasize the latter point. The parties
25 on either sides of these motions are passionate in their

1 articulations of their positions generally in these cases.
2 At times, it has seemed to me that on the narrow issues
3 before me in these motions that passion is not particularly
4 apt and should be saved for arguments on the merits of the
5 appeals and/or motions for stay pending appeal. The Court's
6 determination of the motion before me today, as is
7 appropriate since they're under the judicial code, 28
8 U.S.C., that is, really do go to considerations of
9 jurisprudence and the proper functioning of the trial and
10 appellate courts.

11 As much as the parties' strong feelings on the
12 underlying merits of their appeals and the opposition to
13 those appeals may be, they generally share similar goals
14 here and more importantly, perhaps, the Court's
15 determination here is guided not by issues regarding the
16 merits of the appeals or even the merits of motions for
17 stays pending appeal, but rather, the jurisprudential
18 concerns set forth in the statute and the case law. And I
19 am quite aware of the precedential effect of an opinion,
20 tempting as that might be, that would go contrary to the
21 precedent and the jurisdictional framework of this
22 particular statutory provision solely because of my desire
23 to expedite the case, not to limit the issues in the case
24 but simple to move it to a rapid conclusion.

25 Ironically, I think all of the parties here share

1 with me the desire to move these cases to a rapid
2 conclusion. They disagree over what is the best means to do
3 that as it pertains to these motions, and I will address
4 those concerns. But, ultimately, my ruling here, I believe,
5 must be guided first and foremost by the language of the
6 statute and these cases interpreting it and not by the
7 parties or perhaps ever my own strong feeling that corners
8 could be cut here within the language of the statute in
9 favor of expedition.

10 The second circuit has given considerable
11 guidance, as I said, in the Weaver case as to how to
12 approach these types of motions. Now, I recognize that in
13 the case they were determining whether to accept a
14 certification of a direct appeal, but they talk about the
15 statute generally which clearly goes to the three
16 subsections that would lead a Court to direct a notice of
17 certification since the reflect Congress's intent. As the
18 circuit states, the focus of the statute is explicit on
19 appeals that raise controlling questions of law, concern
20 matters of public importance, and arise under circumstances
21 where a prompt determinative ruling might avoid needless
22 litigation. That's at 484 f3d 158.

23 The circuit goes on to say, "the legislative
24 history confirms that Congress intended this provision to
25 facilitate our provision of guidance on, quote -- I'll

1 highlight this, rather -- pure questions of law." Among the
2 reasons for the direct appeal amendment was widespread
3 unhappiness at the paucity of settled bankruptcy law
4 precedent. The House report that accompanied the BPACPA
5 emphasized that "decisions rendered by a district court as
6 well as bankruptcy appellate panel are generally not binding
7 and lack stare decisis value." The circuit then goes on to
8 cite the House reports setting forth that view. It then
9 says, "indeed, Congress believed direct appeal would be most
10 appropriate when we are called upon to resolve a question of
11 law not heavily dependent on the particular facts of the
12 case because such questions can often be decided based on an
13 incomplete or ambiguous record." Eliding, again, citations
14 to the legislative history, the court continues, "when a
15 discrete controlling decision or question of law is at
16 stake, we may be able to settle the matter relatively
17 promptly."

18 The court then turns to the last prong of Section
19 158(d)(2)(a), namely, "an immediate appeal from the judgment
20 order or decree may materially advance the progress of the
21 case or proceeding in which the appeal is taken." And
22 states -- and this is still at page 158 -- "the legislative
23 history also confirms that direct appeal may be appropriate
24 where a judgment of this court would materially advance the
25 progress of the case. For instance, where a bankruptcy

1 court has made a ruling which if correct will essentially
2 determine the result of future litigation. The parties
3 adversely affected by the ruling might very well fold up
4 their tents if convinced that the ruling has the approval of
5 the court of appeals but will not give up until that becomes
6 clear. When that ruling is manifestly correct or manifestly
7 erroneous, the parties would profit from its immediate
8 review in this court."

9 I think it is fair to say that what the court was
10 addressing there and what many courts and the leading
11 treatise on bankruptcy have noted also with regard to the
12 third prong, i.e., materially advancing the progress of the
13 case or proceeding, is a focus on the case not the appeal
14 itself, not the speed of the appeal, but the conduct of the
15 case, and accordingly, have applied that section where it
16 has been applied to interlocutory appeals or appeals that
17 for purposes of the bankruptcy courts jurisprudence on what
18 constitutes a final order will determine the direction of a
19 case, i.e., a gatekeeping issue for how the parties will
20 then proceed to negotiate a plan and the like. I take this
21 in part also from the court's following analysis in Weaver
22 where it focuses on interlocutory appeals and mandamus as
23 well as the discussion in I Collier at Bankruptcy, paragraph
24 5.06(d), 16th ed. 2021.

25 The circuit noted in the Weaver case, however,

1 that Congress carefully limited the circumstances for a
2 direct appeal while introducing the possibility of the right
3 in Section 158(d)(2)(a). At paragraph 160 of the opinion,
4 the circuit states, "nevertheless, although the Congress
5 emphasized the importance of our expeditious resolution of
6 bankruptcy cases, it did not wish us to privilege speed over
7 other goals. Indeed, speed is not necessarily compatible
8 with our ultimate objective: Answering questions wisely and
9 well. In many cases involving unsettled areas of bankruptcy
10 law, where viewed by the district court, would be most
11 helpful. Courts of appeals benefit immensely from reviewing
12 the efforts of a district court to resolve such questions.
13 Permitting direct appeal too readily might impeded the
14 development a coherent body of bankruptcy case law."

15 I'll skip certain citations and then go on the
16 rest of the quote: "Moreover, since district courts tend to
17 resolve bankruptcy appeals faster than courts of appeals" --
18 citations omitted -- "and because this court has relaxed the
19 meaning of finality in bankruptcy cases, the cost of speed
20 of permitting district court review will likely" -- I'm
21 sorry -- "the cost in speed of permitting district court
22 review will likely be small."

23 The court went on the state twice that,
24 "therefore, in exercising its discretion whether to take a
25 direct certification it would most -- in most cases -- adopt

1 the latter path of allowing some cases to percolate through
2 normal channels," id., and also id., at 161.

3 That view is to the caution with which courts
4 should approach a request to certify a direct appeal is born
5 out in the case law where the courts have held that direct
6 certification of an appeal is a procedural remedy reserved
7 for exceptional circumstances in which guidance of the
8 circuit courts of appeals is necessary. See, for example,
9 In re Sabine Oil and Gas Corp., 551 B.R. 132 142 SDNY 2016
10 and In re BGI, Inc., 504 B.R. 754 770 SDNY 2014. And I'm
11 sorry, the Sabine case is a bankruptcy SDNY 2016 cite.

12 The movants have contended that each of the three
13 subsections is independently met under Section 158(d)(2)(a)
14 and correctly noted that they can move ahead and must
15 certify a direct appeal where any one of them is met. See,
16 for example, Homaiddin, H-O-M-A-I-D-I-N, v Sallie Mae, S-A-L-
17 L-I-E, M-A-E, 2020 U.S. District LEXIS 177 126 EDNY February
18 25, 2020, where all of the parties agreed that there was no
19 controlling case from the Supreme Court or the second
20 circuit on the issue before it -- an important issue --
21 involving the interpretation of the non-dischargability of
22 obligations to repay funds received as an educational
23 benefit, scholarship, or stipend. The objectants argue to
24 the contrary that none of the subsections of 28 U.S.C.
25 158(2)(a) have been satisfied.

1 The case law is clear and consistent with the
2 Weaver case that only pure questions of law, not mixed
3 questions of law and fact with some exceptions where the
4 record is crystal clear and it's primarily not exclusively a
5 legal question, are the types of issues covered by both
6 subsections, I and II, of the statute. Again, see Weaver
7 484 f3d at 158 and In re American Home Mortgage Investment
8 Corp., 408 B.R. 4244 D Delaware 2009.

9 In addition, the courts have addressed at length
10 whether a question of law for purposes of this provision is
11 one "as to which there is no controlling decision of the
12 court of appeals for the circuit or of the Supreme Court of
13 the United States."

14 I will note that the U.S. Trustee made for the
15 first time at oral argument the argument that there need not
16 be a controlling decision -- I'm sorry -- that there may
17 need to be -- excuse me -- there may be a controlling
18 decision at the circuit level, but if there is not one at
19 the Supreme Court level, then subsection I is satisfied. I
20 thoroughly disagree with that argument. The United States
21 Supreme Court rules in a good year on one or two bankruptcy
22 matters, deny certiorari on scores of them, and the notion
23 that circuit law would not be controlling and instead, the
24 path of direct certification should be one aimed at the
25 United States Supreme Court appears to me to be completely

1 inconsistent with the statute's purpose and in addition, is
2 inconsistent with the statute's plain meaning. It wouldn't
3 reference the court of appeals for the circuit, i.e., in
4 this case, the second circuit, if controlling law at the
5 court of appeals level would be irrelevant to the
6 determination as was argued at appeal -- I'm sorry -- at
7 oral argument by the U.S. Trustee.

8 As far as what is controlling law for purposes of
9 subsection 2(a)(i), the courts have recognized that this may
10 be supplied by combining holdings from multiple cases, but
11 it is nevertheless law at the circuit level or if there's no
12 law at the circuit level, at the Supreme Court level which
13 admits no ambiguity in resolving the issue of pure law
14 because that's the first element of the requirement in (i).
15 See, In re Gravel 2019 Bankruptcy LEXIS 2576 at page 13;
16 Bankruptcy D Vermont August 12, 2019; and In re Millennium
17 Lab Holding, II, LLC, 543 B.R. 703 708 Bankruptcy D Delaware
18 2016.

19 Again, one is governed by the clear direction from
20 the Weaver case that the statute works where there is
21 discrete controlling question of law at stake that can be
22 decided without focusing on an extensive factual record.
23 The courts have dealt with arguments that try to find a
24 niche outside of controlling precedent and generally have
25 been wary of such arguments. As noted by such courts, novel

1 arguments do not make controlling precedent any less so.
2 See In re Ladder Number 3 Corp., 2018 WL 2298349 EDNY March
3 28, 2018; and In re Goody's Family Clothing 2009 U.S.
4 District LEXIS 67011 at page 5 D Delaware July 30, 2009.

5 As also noted by the district court for the
6 District of Delaware, direct certification is not warranted
7 where a movant was not arguing the absence of controlling
8 law but was arguing the absence of a decision that adopted
9 its position, In re Comex Holdings, LLC, 534 B.R. 606 611 D
10 Delaware 2015. See also In re Fisker Automotive Holdings,
11 Inc., 2014 U.S. District LEXIS 17689 at page 12, note 3, D
12 Delaware, February 12, 2014.

13 The reason for this approach I think was made
14 clear by Judge Gerber in In re General Motors, Corp., 409
15 B.R. 24 Bankruptcy SDNY 2009 where the court emphasized that
16 the statute, no matter how important the matter be to a
17 particular case, does not in this provision require direct
18 certification where the circuit would be only deciding again
19 what it had previously decided in prior cases. The focus
20 instead is on where the circuit would be asked to make new
21 law and the context of that, again, is purely a legal
22 question.

23 As the editors of Colliers note, most of the
24 requests for certification involving important matters of
25 statutory -- involve important matter of statutory

1 interpretation where there is a new statute, either the
2 amendment to a bankruptcy code provision or a separate
3 statute that requires interpretation for purposes of the
4 bankruptcy court's exercise of its jurisdiction over the
5 case as was the case in *Springfield Hospital v Carranza*, In
6 re *Springfield Hospital, Inc.*, 618 B.R. 109 bankruptcy D
7 Vermont 2020; see I Collier on bankruptcy, paragraph
8 5.06(a).

9 Finally, as far as Section 158(2)(a)(i) is
10 concerned, Congress, as a separate basis under that
11 provision, if the matter involves -- or the appeal involves
12 -- a matter of public importance. Again, the courts have
13 spent substantial time construing that provision and also
14 can be said to have construed it narrowly. Under the case
15 law, a matter of public importance for purposes of this
16 section is a legal question that will advance the cause of
17 jurisprudence to a degree that is usually not the case if
18 decided by the circuit. *Mark IV Industries, Inc., v The*
19 *Mexico Environmental Department*, 452 B.R. 385 388-89 SDNY
20 2011; In re *American Home Mortgage Investments Corp.*, 408
21 B.R. 44; In re *Nortel Networks Corp.*, 2010 Bankruptcy LEXIS
22 812 bankruptcy D Delaware March 9, 2010; and In re *General*
23 *Motors, Corp.*, 409 B.R. at 28.

24 The court in that decision, which I've already
25 cited, was obviously presiding over a substantial business,

1 and the effect of its decision would affect literally tens
2 of thousands of people. In addition, parties raised
3 constitutional issues. Nevertheless, the court determined
4 that a direct appeal was not warranted since guidance on
5 those issues in a controlling way for purposes of the
6 statute existed. See also, *In re Sabine Oil and Gas, Corp.*,
7 551 B.R. at 40.

8 Having heard the parties' arguments and obviously
9 being quite familiar with the issues on appeal, I believe
10 that the movants have not satisfied their burden under
11 Section 158(2)(a)(i), either on the first aspect of that
12 provision, i.e., the no controlling decision point, or the
13 alternative aspect of that provision, i.e., involves a
14 matter of public importance. The court's decision that is
15 the subject of the appeal of the confirmation order
16 addressed at length the substantial case law at the circuit
17 level governing each of the issues on appeal that are
18 highlighted for purposes of these motions. It addressed the
19 controlling decisions on the court's jurisdiction, namely
20 *Celotex* and *Quigley* -- that is, the Supreme Court's *Celotex*
21 opinion and the second circuit's opinion in *In re Quigley*,
22 676 f3d 45 2d circ 2015.

23 It addressed the *Stern v Marshall* issues which,
24 though directly addressed on point in this circuit by the
25 circuit court, have been the subject of extensive general

1 rulings by the circuit and the Supreme Court in multiple
2 opinions which, at best, the circuit would be asked to
3 refine the application of that case law to the particular
4 facts of this case not a pure question of law for purposes
5 of how that term is viewed in this provision.

6 The court also addressed the due process issues
7 which obviously are governed by Moline v Hanover at the
8 Supreme Court level and the second circuit's Motors
9 Liquidation case which I believe are controlling decision,
10 either at the Supreme Court level or, where there is a
11 decision at the second circuit level, at that level. In
12 addition, and as I noted in my ruling that's on appeal, the
13 applicability of due process concerns is substantially fact-
14 based and does not present a pure issue of law, I believe,
15 although, it is one that, I believe, is subject to rather
16 rapid review, given the record before the Court and the
17 ultimate ruling by the Court.

18 The appealing states have argued that no second
19 circuit opinion of Supreme Court opinion exists applying or
20 construing the issue of a course of third-party claims
21 release to states who are asserting, at least in part, their
22 police power rights or their police power. I agree with
23 that assertion, albeit, that there are certainly decisions
24 in other circuits that address that point, although
25 primarily implicitly.

1 I do not believe, however, that that lack of a
2 decision directly on point is a factor that should require
3 me to certify a direct appeal. The bankruptcy code itself
4 addresses the limitations of the bankruptcy power in
5 response to the police power of governmental entities and
6 otherwise, does not cabin it. And I believe that,
7 therefore, this argument, while certainly a perfectly
8 appropriate argument for appeal as it was perfectly
9 appropriate to make before me, falls into the category of
10 arguments that were addressed in, for example, Goody's
11 Family Clothing and Comex Holdings that I previously cited.

12 In addition, the question is not a pure question
13 of law, I believe, given that the nature of the police power
14 that is being asserted at this point was addressed as a
15 factual matter by the Court in the decision and order that
16 is the subject of the appeal. It may well be that some
17 types of police power, for example, would not be subject to
18 a mandatory release and injunction, as opposed to the types
19 of police power that are asserted or were asserted before me
20 and now are being asserted on appeal. Again, therefore, one
21 does not see where the guidance from the circuit bypassing
22 the district court's analysis of the record below would be
23 required under the statute.

24 The movants equate the issue of public importance
25 for jurisprudential purposes and controlling decision. At

1 times that is helpful but at times that is not. Clearly,
2 something is of public importance if the law is not clear,
3 and that law will come up again and again. That's obviously
4 where guidance is warranted, as discussed in the Weber case,
5 from the circuit. On the other hand, the topic of coerced
6 third-party claims releases in bankruptcy cases, while it
7 does come up often in bankruptcy cases, is the subject of
8 controlling decisions -- the plural -- in the second circuit
9 and that controlling case law, further, requires the Court
10 to make a detailed factual analysis which is, of course,
11 what I tried to do in my ruling that's now the subject of
12 appeal as required by the second circuit in the Metromedia
13 case and the cases that follow it.

14 So it appears to me that as the courts have
15 cabined the phrase "matter of public importance" to apply to
16 jurisprudential guidance, beyond that, in the normal
17 appellate process, this is not a matter of public
18 importance, because, again, it as Judge Gerber held in the
19 GM case, it's not a matter of public importance for purposes
20 of this statute, that the court decide again the type of
21 issue that it has decided in the past.

22 The motions, therefore, do not satisfy the first
23 prong of Section 158(2)(a) nor do they satisfy the second
24 prong, i.e., that judgment order or decree involves a
25 question of law requiring resolution of conflicting

1 decisions. The case law is almost uniform, and this is
2 certainly consistent with the reading of the statute as a
3 whole, that the case law referred to in this section is case
4 law within the circuit below the circuit level. Obviously,
5 given subsection (i) which focuses on controlling decisions
6 in the circuit, the fact that there is conflicting case law
7 outside of the circuit cannot be what Congress intended to
8 acquire a direct appeal of an issue that is not the subject
9 of conflicting decisions within the circuit. Again, see I
10 Collier on bankruptcy, paragraph 5.06(c) as well as In re
11 General Motors Corp, 409 B.R. 24.

12 Here there is no conflicting case law within this
13 circuit on the issues that are up for appeal. The two cases
14 cited by the U.S. Trustee clearly recognize the requirement
15 that any trial court must follow when dealing with these
16 issues. To follow the Second Circuit's case law, including
17 the Metromedia case, they found in that -- in each of those
18 cases that the Second Circuit's requirements were not
19 satisfied and therefore denied the relief. But that is not
20 a conflict.

21 Indeed, one would be shocked if a court in the
22 Second Circuit, which includes all the states in the Second
23 Circuit, including the state of Connecticut where the
24 Debtors are headquartered, would not follow the circuit law
25 as set forth in the Johns Manville, Drexel, and Metromedia

1 opinions as well as In re Quigley, following Metromedia,
2 that discusses the requirements in the Second Circuit for
3 the imposition of a third-party claims release in a
4 bankruptcy case.

5 That case law, as noted by Judge Wiles in In re
6 Aegean Marine Petroleum Network Inc., 599 717, 728 (Bankr.
7 S.D.N.Y. 2019) is governing -- the governing case law
8 requires me to consider, et cetera, et cetera the factors in
9 Metromedia. Indeed, in that case, Judge Wiles found a basis
10 for a third-party release and exculpation that anyone who is
11 a lawyer would cite this opinion as being controlling case
12 law, and that includes law professors, must either be
13 wearing blinders or simply intending to misrepresent the law
14 in the Second Circuit.

15 Similarly, In re SunEdison, Inc., 576 B.R. 453
16 (Bankr. S.D.N.Y. 2017) does not stand, as has been asserted
17 by the U.S. Trustee, for the proposition that Metromedia is
18 not controlling in this circuit and that the bankruptcy
19 courts in this circuit can chart their own paths without
20 following it.

21 Indeed, Judge Bernstein in that cases at pages 461
22 through 62 analyzed how Metromedia would apply and found
23 that it did not apply to the releases at issue, although he
24 did find that he had jurisdiction if the plan was amended to
25 comply with Metromedia id est 462. So I conclude that the

1 second prong, or the second alternative basis for certifying
2 a direct appeal, namely that set forth in Section 158(a)(ii)
3 does not apply here either.

4 Finally, the parties rely on the third prong,
5 namely (iii) "an immediate appeal from the judgment order or
6 decree may materially advance the progress of the case or
7 proceeding in which the appeal is taken." This provision
8 too is a subject of considerable interpretation and again
9 should be read in the context of the entire section of the
10 judicial code.

11 The courts have been clear about the following.
12 First, consistent again with the Weber case, which I
13 previously quoted, the mere fact that leapfrogging the
14 district court in the appellate chain might expedite a final
15 determination is not what Congress had in mind in this
16 provision. If that were the case, one would intuitively
17 think that it would always apply. See *In re Johns-Manville*
18 *Corp.*) 449 B.R. 31, 34 (S.D.N.Y. 2011). See also 1 *Collier*
19 *on Bankruptcy Paragraph 6[d]* and *In re Fisker Automotive*
20 *Holdings Inc.* 2014 U.S. Dist. LEXIS 17689 at Page 12.

21 The section by its plain terms refers to advancing
22 the case, not advancing the appeal. One, I suppose, could
23 construe the cases being advanced by having a final
24 determination, but I think Congress chose that word
25 carefully as opposed to simply setting up a prong that would

1 obviate the careful consideration of the other two, except
2 where one would need to engage in speculation as to how fast
3 an appellate court might rule, something I don't believe
4 Congress really wanted the lower courts to engage in.

5 The courts have also made it clear that the fact
6 that parties on a near-certain basis will want to eventually
7 take their appeal to the circuit is not a basis for direct
8 certification. See, for example, In re Lehman Brothers 013
9 WL 5272937 (S.D.N.Y. Sept. 18, 2013) and In re Millennium
10 Lab Holdings II LLC 543 B.R. 703 716-17 (Bkrtcy.D.Del.
11 2016).

12 I guess I can conceive of a situation, for
13 example, where the district judge that drew an appeal of a
14 matter that warranted expedited determination and could not
15 decide it because, for example, she was about to conduct a
16 three-month jury trial. A court might take into account
17 this provision and say under these circumstances, rather
18 than stay the matter or, alternatively, not stay it and risk
19 that there be no appellate review because of the doctrine of
20 equitable mootness would certify a direct appeal.

21 I believe that concern clearly does not apply
22 here. District Judge McMahon, who has the appeals, has
23 already set an expedited briefing schedule where she will
24 hear oral argument on November 3 -- 30, excuse me, bearing
25 out the Weber court's observation that normally appeals

1 through the district court through the circuit move faster.

2 The U.S. Trustee has pointed out that under 28
3 U.S.C. Section 158(2)(d), my certifying a direct appeal
4 would not stop or preclude Judge McMahon from deciding the
5 appeal before, and that is true. I believe it is also true,
6 knowing Judge McMahon's character and work ethic, that I do
7 not believe her knowing that I had certified a direct appeal
8 would cause her to put her pen down.

9 And I understand that if she ruled, and I expect
10 she will soon after the appellate argument on November 30th,
11 i.e. sometime in December, the parties could go to the
12 circuit and say, "We're withdrawing our request that you
13 accept a direct appeal," and instead request that you too
14 seek expedited treatment -- or grant expedited treatment.
15 However, the two-track process would create an extra around
16 of decision making, including at the circuit level, extra
17 briefing and oral argument, and create its own docket, which
18 the record before me, I think, establishes at least that
19 that docket would have its own life and take its own time.

20 In addition, and this is a more important
21 consideration, one of the issues raised on appeal, which I
22 decided in favor of the Debtor's on, is that consistent with
23 the Third Circuit holding and district court level holding
24 in the Third Circuit and in the Second Circuit, and
25 bankruptcy court holding in the Section Circuit, the Court

1 has the power to issue a final order confirming a plan as a
2 fundamental aspect of the adjustment of debtor-creditor
3 relations under the Supreme Court Stern v. Marshall case
4 law.

5 Long ago, before that case law become much more
6 clarified, including at the supreme court level, the
7 district court entered an amended standing order that among
8 other things gave the district court the power to treat a
9 bankruptcy judge's determination, which the bankruptcy judge
10 believed could be a final order as proposed findings of fact
11 and conclusions of law, which of course Stern v. Marshall
12 would permit. With the appeal in front of Judge McMahon,
13 that can happen if it were certified directly to the
14 circuit, and the circuit took it and determined that I was
15 wrong on the Stern v. Marshall point and disagreed with the
16 Third Circuit in the Millennium II case, an extra step
17 involving proposed findings of fact and conclusions of law
18 would have to be taken, in all likelihood by the district
19 court, although perhaps by this Court on remand, ultimately.
20 That would waste time.

21 There are arguments to be made on both sides on
22 that issue, but that issue, I believe, ultimately under
23 these facts is not what Congress in Section 158(2)(a)(iii) I
24 believe meant the Court to focus on, i.e. the speed of the
25 appeal process, unless in extreme situations that I've

1 already mentioned. It meant to focus on the case and
2 activity within the case so that the case could proceed to
3 its conclusion with legal issues defined along the way that
4 are gatekeeping issues. So I conclude that the movants have
5 not shown that a third prong of Section 158(d)(ii) has been
6 satisfied either.

7 Again, I do not view this determination as one
8 that requires a lot of heat or passion. It's a
9 jurisprudential issue where the precedents are important and
10 where the courts have consistently held, and the Second
11 Circuit has consistently focused the courts on holding that
12 the Court should be careful in reading the statute broadly
13 and rather should issue a direct certification in only rare
14 instances, as I've previously outlined.

15 So I will ask the Debtors to submit an order
16 consistent with that ruling denying the motion. Needless to
17 say, the request for directive appeal of my September 15,
18 2021 order also does not meet the requirements of the
19 statute in any respect for the reasons that I've outlined.
20 There really was no attempt to do so by the U.S. Trustee.
21 And frankly, I think the only reason for it is the U.S.
22 Trustee's hope that the appeals would go forward together
23 because of its concern, or his concern, about mootness
24 issues, which really are more appropriately dealt with when
25 courts consider motions for stay pending appeal.

1 So let's turn to the last matter on the agenda,
2 which is the pretrial conference that the Court previously
3 scheduled in our first conference on September 30 regarding
4 the motions for stay pending appeal filed by various parties
5 in interest, some of whom were not parties to the motion
6 that I've just decided because I noted at the beginning of
7 this morning's calendar, I've had a chance to review Judge
8 McMahon's order from the 13th of this month denying without
9 prejudice the United States Trustee's emergency motion for a
10 stay pending appeal.

11 I'm not sure that motion when she granted the TRO
12 actually advised Judge McMahon that the parties were already
13 going to be appearing on that issue before me on November
14 9th. But in any event, Judge McMahon denied the motion
15 without prejudice on the conditions stated in her order,
16 which I fully agree with and hope I had already signaled to
17 the parties they should agree with so that the November 9
18 hearing can move forward, as I think Congress contemplated
19 in the 8,000 rules of the bankruptcy rules.

20 So I left this matter with the parties hoping that
21 we wouldn't need to have a long conferences when we were
22 last here at the end of September, and I think the only
23 issues that really were going to come up, if at all, applied
24 to whether parties would be offering witnesses, or which
25 parties would be offering witnesses, and which discovery

1 would take place in advance of the November 9 hearing. I
2 have received a motion to quash deposition notices that was
3 made by the U.S. Trustee. I've deferred to conference on
4 that as well as briefing on the stay motion because it
5 seemed like the parties might be able to resolve it,
6 particularly in light of the imminent -- then-imminent
7 ruling by Judge McMahon.

8 So let me open the floor up to those who have
9 sought a stay pending appeal and the parties on the other
10 side, and ask, have you at this point agreed who is putting
11 together witnesses -- who is going to be putting on
12 witnesses, and if so, to a discovery schedule?

13 MAN 1: Your Honor, if I may, I was going to turn
14 the podium over for Davis Polk to Mr. Kaminetzky. There
15 actually is some good news to report on some schedule
16 issues, which is great, and then some uncertainty on others.

17 Your Honor, just for the record, you are
18 completely correct. The U.S. Trustee's motion did not
19 advise the district court at all about November 9th or other
20 things, but we'll leave that aside.

21 So I will put myself on mute and turn over to Mr.
22 Kaminetzky, if that's okay with the Court.

23 THE COURT: Okay. That's fine. So why don't you
24 -- why don't the parties tell me what they've agreed on
25 first?

1 MR. KAMINETZKY: This is Ben Kaminetzky at Davis
2 Polk. I'm actually going to send it to Mr. Tobak
3 (indiscernible) from the creditors' committee who has been
4 dealing with (indiscernible).

5 THE COURT: All right.

6 MR. TOBAK: This is Marc Tobak. I believe Mr.
7 Hurley will be presenting on the schedule.

8 THE COURT: Okay. I think you're going to have to
9 get a little closer to the microphone, Mr. Tobak, and maybe
10 speak a little slower just so we can pick you up.

11 MR. TOBAK: Sorry about that. This is Marc Tobak,
12 Davis Polk. I believe Mr. Hurley from Akin Gump who
13 represents the committee will actually be presenting on the
14 agreed schedule.

15 THE COURT: Okay. So why don't I hear from the
16 Committee's counsel then? Unless I put him to sleep with my
17 ruling, or her.

18 MR. HURLEY: Yes, good afternoon, Your Honor.

19 THE COURT: Oh, there he is. Okay.

20 MR. HURLEY: Your Honor, apologies --

21 THE COURT: That's fine.

22 MR. HURLEY: -- for the delay. Our camera was
23 turned off, we think, by the Court. And we've been
24 (indiscernible) --

25 THE COURT: All right.

1 MR. HURLEY: -- back online.

2 THE COURT: Okay.

3 MR. HURLEY: So here we are.

4 MAN 1: Hey, Mitch. There are two Akin Gump lines
5 that are not muted, and I think they're interfering with
6 each other, so you should probably mute one of them.
7 There's a Mitch line and then --

8 MR. HURLEY: My apologies again, Your Honor. So
9 yeah, Mitch Hurley with Akin Gump Strauss Hauer Feld on
10 behalf of the official committee. Your Honor, can you hear
11 me?

12 THE COURT: Yes.

13 MR. HURLEY: My apologies, Your Honor. Can you
14 hear me?

15 THE COURT: Yes, and see you.

16 MR. HURLEY: So regarding the motion to be heard
17 by the Court on November 9th, certain parties have reached
18 an agreement on the schedule (indiscernible). Before I read
19 onto the record what that is, I want to make clear for the
20 record --

21 THE COURT: I'm sorry. Now I'm not hearing you.
22 You're going to have to get closer to the mic. You're very
23 hard to hear.

24 MAN 1: Yeah. Hey, Mitch. There's a second Akin
25 Gump line in addition to yours that's not muted. I think

1 that's the problem. There's someone called Akin Gump New
2 York 2, which is a separate box. Maybe you have two mics
3 going.

4 MR. HURLEY: Yeah. What's going on in is we
5 originally had a camera set up, and I think the Court
6 actually shut that camera down, so we can't access that or
7 control it at all.

8 THE COURT: Well, can we turn off that other mic?
9 Can we mute -- can we turn off that mic? No? Okay.

10 MR. HURLEY: If you turn it on, actually, then I
11 can shut the computer off and just (indiscernible).

12 THE COURT: Can you turn on the other camera, the
13 other Akin Gump --

14 CLERK: (Indiscernible) camera. I don't know what
15 happened.

16 THE COURT: I'm being told there was only one
17 camera.

18 CLERK: One camera online.

19 MR. HURLEY: Can you hear me okay?

20 THE COURT: Yeah. You just have to move closer to
21 your microphone.

22 MR. HURLEY: Okay. So before I just -- before I
23 read onto the record what the agreement is, I want to make
24 clear who the parties are who have agreed to it.

25 So on the movant's side, the agreeing parties are

1 the states of Washington, Connecticut, and Maryland, plus
2 the U.S. Trustee, and the (indiscernible).

3 On the non-movant's side, the agreeing parties --

4 THE COURT: So that's everyone, right, who has
5 made a motion for stay pending appeal?

6 Now you've just -- now we can't hear you at all.

7 MR. HURLEY: (Indiscernible). On the non-movant
8 side, the agreeing parties are the Debtors, the UCC, Ad Hoc
9 Committee of Governmental and other (indiscernible), and the
10 Ad Hoc Group of Individual Victims, plus the Ad Hoc Group
11 (indiscernible).

12 THE COURT: Okay.

13 MR. HURLEY: (Indiscernible).

14 THE COURT: So is there anyone, again, who is
15 going to be active on these motions for stay pending appeal
16 that has not agreed?

17 MR. HURLEY: Not that I'm aware of, Your Honor.

18 THE COURT: Okay. All right.

19 MR. HURLEY: I will put the agreement on the
20 record now. The agreement is the deadline for opposition to
21 the motion of stay, the (indiscernible) witness declarations
22 (indiscernible) is October 22nd.

23 THE COURT: October 22nd?

24 MR. HURLEY: Correct.

25 THE COURT: Okay.

1 MR. HURLEY: The deadline for the movants to
2 provide opposing rebuttal witness declarations, again if
3 any, October 29th. And the deadline for (indiscernible) on
4 the stay motions, including objections to witness
5 declarations, again if any, is November 1st, no later than
6 2:00 p.m. on November 1st. To the extent that depositions
7 are required, witnesses will be made available at a
8 (indiscernible) prior to the November 9th hearing so that no
9 party is prejudiced.

10 Were you able to hear that okay, Your Honor?

11 THE COURT: I can't hear that last part, no.

12 MR. HURLEY: To the extent that depositions are
13 required, witnesses will be made available at a significant
14 time in advance of the hearing so that no party is
15 prejudiced.

16 THE COURT: Okay.

17 MR. HURLEY: And that's the agreement.

18 THE COURT: All right. So is it fair to say that
19 the parties don't know yet what witnesses they're going to
20 call because they have time to still think about that?

21 MR. HURLEY: So certain of the non-movants have
22 identified witnesses that they intend to call and to provide
23 declarations to the Court. The movants have reserved their
24 rate. They may put in declarations. They may not. They've
25 also reserved their right (indiscernible) declarations

1 (indiscernible).

2 THE COURT: Okay. And that's understandable.
3 They want to see what your witnesses say.

4 MR. HURLEY: I believe that's right, Your Honor.

5 THE COURT: Okay. All right. So it's
6 contemplated that this may be an evidentiary hearing with
7 live witness testimony, in which case someone should have
8 marked up an order for that purpose, similar to the order
9 that applied for the confirmation hearing, you know, an
10 electronic remote hearing order.

11 MR. HIGGINS: Your Honor, this is Ben Higgins for
12 the U.S. Trustee. May I be heard?

13 THE COURT: Yes.

14 MR. HIGGINS: Thank you, Your Honor. I know it's
15 been a long hearing. I just have a couple points to address
16 on this regard.

17 First, I want to correct what Mr. Huebner said.
18 Our emergency motion did reference the November 9th hearing
19 on the opening page and again on Page 13, so I want to make
20 sure the record is clear about that.

21 Second, the U.S. Trustee is okay with the proposed
22 schedule, but we do want to emphasize that there is already
23 an extensive evidentiary record after a multiday trial, and
24 we don't think a second extensive trial is appropriate or
25 necessary for the Court to decide the motions for a stay

1 pending appeal, and that is now especially true in light of
2 Judge McMahon's ruling yesterday, which we think is at least
3 persuasive authority for this Court when it ultimately rules
4 on the stay issue.

5 And as Your Honor is aware, it's not unusual for
6 parties to simply move orally for a stay pending appeal
7 after a Court's ruling, but here when Your Honor issued a
8 conditional bench ruling at the trial's convulsion, we felt
9 it was both prudent and necessary for the sake of a clear
10 record to take the time to actually read the transcript of
11 Your Honor's decision and to file a written motion.

12 And to the question of witnesses, we have filed a
13 designation identifying the various documents in the
14 extensive record that we support that -- we believe support
15 any factual assertions in our briefs, so we don't intend to
16 put on any affirmative witnesses.

17 We do intend to file very shortly an amended brief
18 that simply adds the specific citations to those designated
19 portions of the record. We do reserve the right to put on
20 rebuttal witnesses, but we're hoping that won't be
21 necessary.

22 But as Judge McMahon made clear in her ruling
23 yesterday, and Your Honor made clear back on September 30th,
24 these appeals should be determined on their merits. In
25 light of those statements from both the bankruptcy court and

1 now the district court, we believe it should be clear that
2 the parties can all save some time here by simply agreeing
3 to a stay pending appeal as Your Honor suggested back on
4 September 30th. But if necessary, we're prepared to go
5 forward with the proposed schedule and with the November 9th
6 hearing.

7 With regard to the motion to quash that Your Honor
8 mentioned, I won't get into the merits. As you've noted, we
9 have filed a premotion letter. We believe the notice is
10 inappropriate and that it seeks irrelevant information, and
11 the mental impressions and strategy of the attorneys
12 representing the U.S. Trustee, and we look forward to that
13 conference with Your Honor if we can't work that out with
14 the PI group.

15 And the last point, Your Honor, which is a little
16 bit off track, but it is related to the scheduling, is that
17 we have asked the Debtors to provide status reports
18 disclosing what they are actually doing to prepare for the
19 sentencing date and the effective date. And we aren't
20 looking for anything elaborate, but to the extent there is
21 not a stay, which will be the case when Judge McMahon's TRO
22 is dissolved, we think there should be some visibility for
23 the Court and the parties to see what actions are actually
24 taking place so we can have some assurance that they are
25 truly just administrative or administerial in nature. So

1 the Debtors haven't responded to this request, Your Honor,
2 but to the extent there is no stay in place, we would -- we
3 would ask the Court to direct them to provide some type of
4 regular status report in that regard.

5 I have nothing further, Your Honor, unless you
6 have questions about any of that.

7 THE COURT: I --

8 MR. SHORE: Your Honor, I'm happy to respond in
9 part to Mr. Higgins (indiscernible).

10 THE COURT: Let me -- let me hear first, I guess,
11 from Mr. Edmunds, and then I'll address -- I'll let people
12 address each of their comments.

13 MR. EDMUNDS: Thank you, Your Honor. Just first
14 an update. Yesterday, the State of Maryland was served with
15 a deposition subpoena and document requests, and I think
16 that we are still in the process of talking that over with
17 the UCC, which served the requests (indiscernible).

18 THE COURT: You cut out for some reason, Mr.
19 Edmunds. I can't hear you. Can anyone else hear him?

20 MR. EDMUNDS: -- can't hear you.

21 THE COURT: Now I can.

22 MR. EDMUNDS: Now, I can.

23 THE COURT: Now I can hear you.

24 MR. EDMUNDS: Okay. Yeah. I can hear you too
25 now.

1 In any case, we are going to work through that
2 with UCC, but we have a preliminary position to all of this
3 similar to the Trustee's, which is that discovery certainly
4 shouldn't be necessary in this case in light of the record
5 that Your Honor already has.

6 I think you're familiar with the plan and what it
7 does, and you've heard extensive evidence on the need for
8 the plan and issues that relate to what the plan does in
9 helping with the problem that is the opioid crisis and what
10 is at stake here. I think that that was also to what the
11 confirmation hearing was about. And it might warrant under
12 Rule 9017, which incorporates Federal Rule of Civil
13 Procedure 43(C), a standard where it's in the Court's
14 discretion what it needs to hear outside the record, and
15 it's largely a standard of what will assist the Court in
16 resolving the stay motions, and I think that the Court
17 likely knows all that it needs to know from the record it's
18 already received without the added burden on both the
19 estate, and the parties, and the Court, all three, of
20 hearing evidence and entertaining motions on discovery,
21 especially over issues that the Court has been hearing about
22 and is well versed in after two years of litigation. The
23 issues of irreparable harm, which is the justification for
24 the discovery, are -- ought to be readily apparent to the
25 Court. As Your Honor said in considering the motion that

1 you just decided, that people are largely on the same page
2 about the need for speed. The question is legal issues.

3 THE COURT: Okay.

4 MR. EDMUNDS: And issues on appeal. So think as
5 far as -- especially as far as discovery goes, will 9017 and
6 its incarnation of 43(C) -- would -- I guess the issue is
7 whether the Court really needs that, and I think that the
8 Court has heard a lot and may not need that added cost,
9 burden, and expense, and use of judicial resources.

10 THE COURT: Okay. Was the discovery sought -- was
11 the discovery sought from the State of Maryland of a witness
12 that you intended to call, or more along the lines of what
13 was sought for the U.S. Trustee?

14 MR. EDMUNDS: I think it's along the lines of what
15 was sought for the Trustee. It's the 30(b)(6) notice for
16 designee related to what the state's understanding of the
17 claim and its consequences are.

18 THE COURT: All right.

19 MR. EDMUNDS: And I would just say that we're not
20 -- we are not -- we're not planning on putting in a
21 declaration. We, like the U.S. Trustee, will shortly file a
22 sort of annotated version of our motion with the record -- a
23 voluminous record that supports it. But you know, I think
24 that we do have to -- depending on how the discussions go --
25 need to rethink that, depending on how the Court feels about

1 whether it needs to hear a lot of evidence, and whether
2 discovery is necessary.

3 THE COURT: Okay.

4 MR. SHORE: Your Honor (indiscernible) briefly
5 make a suggestion? Can Your Honor hear me?

6 THE COURT: If you get closer like -- yes, but
7 only if you get closer.

8 MR. SHORE: Okay. All right. As Mr. Edmunds
9 correctly pointed out, the meet-and-confer process between
10 the UCC and Maryland has begun, hasn't been completed. The
11 declaration that we're talking about haven't been served
12 yet. I think it would make sense and would be a more
13 orderly process if parties have an opportunity after the
14 declarations are served to meet and confer, see if they can
15 reach an agreement about (indiscernible). If they can't
16 reach an agreement about (indiscernible) and the role of
17 discovery, at that time come back to Your Honor and ask Your
18 Honor to absolve whatever dispute there may be, but perhaps
19 there won't be a dispute. To raise it now, we think is
20 premature because the process has not had a chance to work
21 itself out.

22 THE COURT: Okay.

23 MR. SHORE: Your Honor, if I could
24 (indiscernible).

25 THE COURT: Well, I could give you some guidance,

1 but I understand both your points.

2 MR. SHORE: Okay. It's -- the deposition is for,
3 I believe, October 19th, and it will require -- you know, it
4 will --

5 THE COURT: Okay.

6 MR. SHORE: -- detract from our other efforts.

7 THE COURT: All right. All right. Does any -- I
8 thought I heard someone else wanting to speak, but maybe I
9 missed it. No? Okay.

10 Hearing no one --

11 MR. SHORE: Sorry, Your Honor. Yeah. Sorry. I'm
12 just - there we go. Chris Shore -- Chris Shore from White &
13 Case on behalf of the Ad Hoc Group. Let me -- let me just
14 address with respect to the U.S. Trustee and actually just
15 ask for an augment because I think we're getting there.

16 We had sent out our notice and then had a meet-
17 and-confer and asked them to stipulate to some issues. It
18 sounds like two of the issues we asked them to stipulate,
19 they've clarified in their letter now. That is that the
20 United States Trustee as the movant is not claiming that the
21 United States Trustee or the federal government is being
22 harmed.

23 We've addressed the issue of whether they're
24 willing to post the bond or otherwise put something on the
25 table if they're wrong. I think they've answered that one

1 and said definitively they are not willing to put anything
2 on the table in the event that the confirmation order is
3 stayed and then later affirmed.

4 The third question was around what Your Honor laid
5 out before, which is the identification of the claims that
6 they are asserting, that is when we -- we talk about the
7 obvious claims that are being frustrated by the victims
8 versus the claims of the parties whose Sackler claims are
9 being released, contrary to their constitutional rights. I
10 wanted an identification of that.

11 What Counsel just said is they're not putting on a
12 witness or putting in anything other than the confirmation
13 hearing. I'm almost certain there was nothing in the
14 confirmation record which identified claims of individuals,
15 so as long as that's the case, I don't think I need
16 discovery on that topic. It leaves only one last issue, and
17 maybe we could get guidance from Your Honor.

18 Depending on how one reads the DOJ settlement, the
19 super priority administrative claim comes into existence at
20 the later of, and it says, "confirmation of the plan and the
21 sentencing." What we really don't want is a situation where
22 there were a sentencing hearing and then, having nothing to
23 do with an appeal, the Debtors can't consulate this plan.
24 There is some intervening event. We just wanted to make
25 sure that the government was not going to take the position

1 that because the plan was confirmed but not consummated,
2 their super priority administrative expense claim came into
3 existence.

4 Now, based upon the look that Your Honor is giving
5 me, I can see that you wouldn't be reading the order that
6 way. And if I could just get confirmation from the United
7 States Trustee that they're not going to be asserting that,
8 the (indiscernible).

9 THE COURT: But I don't -- one of the reasons I
10 was puzzled is I don't think that's the U.S. Trustee's
11 issue. I think that's the Department of Justice's issue.
12 And I know the U.S. Trustee is in the Department of Justice,
13 but I think -- correct me if I'm wrong, Mr. Higgins, but I
14 think that's something you need to be talking to Mr.
15 Fogelman about.

16 MR. HIGGINS: Your Honor, that's exactly right.
17 The U.S. Trustee, you know, we don't have, you know,
18 authority over what happens with the, you know, the
19 Department's position on the administrative priority claim.
20 And I would also like to address what Mr. Shore said about
21 Issue Number 3, if I could very briefly, Your Honor.

22 THE COURT: Well, on that point, I think what your
23 -- your argument is -- you're going to make a legal argument
24 on that point, right?

25 MR. HIGGINS: Yes, but also, Your Honor, I think

1 the plan is clear on its face, that it releases the claims
2 of non-Debtors against the Sacklers, and there are more than
3 2,000 individual person injured -- personal injury claimants
4 that voted against the plan. That's on the record. A few
5 objected. That's on the record. More than 71,000 personal
6 injury victims did not vote on the plan at all. None of
7 these parties consented to release their claims against non-
8 Debtors. The plan is clear on its face that the rights of
9 these parties to sue the Sacklers, their causes of action
10 are terminated --

11 THE COURT: No, no. That's fine.

12 MR. HIGGINS: -- under the plan.

13 THE COURT: I think the only -- the only real
14 issue is whether you are going to present factual testimony,
15 and I don't believe you are, as to what those claims are.
16 If you're not, then this is a nonissue. They're not going
17 to take discovery of you.

18 MR. HIGGINS: Correct.

19 MR. SHORE: I just want to make sure that when
20 we're balancing the arms, the Court can assess --

21 THE COURT: Right.

22 MR. SHORE: -- I have real claims that are getting
23 paid or not getting paid. And on the other side, I have
24 claims that have been asserted but not articulated in any
25 manner that allows you to understand the risks on the other

1 (indiscernible).

2 MR. HIGGINS: And Your Honor, this is really an
3 issue for November 9th, but I mean, the way the Sacklers
4 fought tooth and nail for the releasees by the non-Debtors
5 without consent, I mean, I think it makes clear that they
6 were pretty concerned (indiscernible) --

7 THE COURT: I don't want to get into legal
8 argument. We're just talking about the evidence, and I do
9 have the designation of record in support of amended
10 memorandum of law from the U.S. Trustee, and I have a couple
11 of comments on it. But it's clear to me that you're not
12 looking to introduce a case on behalf of one of those
13 people, even a hypothetical case, right?

14 MR. HIGGINS: I don't think that's the case, Your
15 Honor.

16 THE COURT: Okay.

17 MR. HIGGINS: I mean, if -- we would reserve our
18 right to put in rebuttal evidence if there's something that
19 their declarant says on that type of topic, but --

20 THE COURT: To me, it's largely a legal issue --

21 MR. HIGGINS: -- we're not expecting to --

22 THE COURT: -- which I already identified to your
23 colleague earlier today.

24 MR. HIGGINS: Okay. Thank you, Your Honor.

25 MR. SHORE: So if I might, Your Honor, can I ask -

1 - technically, our letter has been extended to 6:00 tonight.
2 Let me -- if I could talked to the U.S. Trustee and see if
3 we can't just work with that in a manner that --

4 THE COURT: Yeah. It sounds to me that --

5 MR. SHORE: -- my guess is --

6 THE COURT: It sounds to me that this is -- that
7 this discovery is not going to go forward. You just have to
8 get something in writing, and I'll grant that extension.

9 MR. SHORE: Thank you, Your Honor.

10 THE COURT: And I don't know what the other
11 discovery that's being sought is, and I agree with Mr.
12 Hurley that it makes sense for the parties to speak first
13 before raising the issue with me.

14 But I tend to agree with both Mr. Edmunds and Mr.
15 Higgins that this shouldn't be a big litigation festival. I
16 mean, I really think that the movants themselves aren't
17 looking to do that. And I understand that there are
18 balancing of harms issues that the objectors may want to
19 submit evidence on, and the movants are certainly entitled
20 to take discovery on that, and cross examine, and the like.
21 But there's a lot already in the record. And if the parties
22 are largely intending to stay with that record, then I would
23 recommend that the parties -- all the parties do that.

24 In that regard, I do have a problem with some of
25 the items in the U.S. Trustee's designation of record in

1 support of its motion. A number of these things are not
2 evidence, Mr. Higgins. And I'm not quite sure what the
3 purpose is of them. I mean, that would include, for
4 example, six objections to the plan that were filed after
5 the objection deadline, and most of which were filed after I
6 ruled. So I mean, that just doesn't -- you know, I don't
7 think you need it. I don't think that helps your case any,
8 and I would hope that the parties will agree on the
9 methodology that you and Mr. Edmunds outlined, which is, you
10 know, filling in your brief with cites to the record. But
11 obviously those cites need to be evidence. They can't be,
12 you know, some -- and that includes a hearing in Congress.
13 That's not evidence, particular one that --

14 MR. HIGGINS: Sure, Your Honor.

15 THE COURT: -- was scheduled apparently to
16 highlight the testimony of someone who had a live issue
17 before me, I think in part to influence me outside of the
18 courtroom, which I find truly outrageous. So it's not
19 evidence, but you guys can work that out. I'm sure you're
20 able to resolve that.

21 And I reiterate that while this hearing is
22 important, it seems to me, given the schedule that Judge
23 McMahon has outlined, and her understanding of already the
24 balance between the public interest and irreparable harm,
25 and of course she will have dealt with the merits, that --

1 before, I believe, the plan would ever go effective, the
2 parties seriously consider what judges in these situations
3 fairly often do where there is an expedited appeal, reaching
4 an agreement to have a stay in place for a brief period
5 after a ruling by Judge McMahon on the merits of the appeal
6 that gives her the opportunity, and you, to have the type of
7 hearing before her that you were planning to have in front
8 of me on the 9th. I think you all should seriously consider
9 that. She will have had the benefits then of full briefing
10 on the merits and can certainly analyze that prong, and it
11 would obviate the need for two hearings.

12 Now, you may want to set some record here, and I
13 don't know whether the U.S. Trustee still wants to pursue
14 the stay on the September 15 order. I think I should have a
15 hearing on that, although I think you know where Judge
16 McMahon is on that, and I think you can assume that's where
17 I am on that.

18 So I am sympathetic to the statements by Mr.
19 Higgins and Mr. Edmunds that perhaps the parties can
20 stipulate that by agreeing to a stay, say for 10 days or 10
21 business days or 10 days after the issuance of Judge
22 McMahon's ruling, the parties will not hold that agreement
23 against anyone as far as any future requests for a stay, but
24 that would apply so that you don't have to have two hearings
25 and spend the money that could otherwise be going to

1 victims, one way or another.

2 So that's not a ruling, of course, but it's a
3 suggestion and a fairly strong one. I suppose you all play
4 this out not just in my court but in the court of public
5 opinion, but frankly, that's not a court, and I think that
6 it's just a foolish exercise to do that. But I will hear
7 you all if you don't reach that type of agreement, and you
8 may want to set out the record so that you can have it, and
9 that's fine with me. And that's also acceptable to me, but
10 I would not be averse to that type of agreement either.

11 So I don't know if anyone has anything more to say
12 on the pretrial conference, prehearing conference. No?

13 MR. SHORE: Your Honor, nothing on the pretrial
14 conference, but I've got one other issue to address today.

15 THE COURT: Okay.

16 MR. SHORE: Under the confirmation order, the
17 1129(a)(4) applications are due Monday would be -- which
18 would put it as a setting on the November 18th omnibus. I
19 can't do that date. Do you want me just to -- do you want
20 to move it to the December and move out the deadline?

21 THE COURT: Yeah. I think we should move it. I
22 mean, you're still working. Among other things, I'd have to
23 have two hearings. I'm trying not to have two hearings on a
24 lot of different things.

25 MR. SHORE: Right. So if we could -- if we could

1 just provisionally then set it for the December 16th omnibus

2 --

3 THE COURT: That's fine.

4 MR. SHORE: -- and have the papers come in no
5 later than December 2nd, and then we'll at least have had --
6 you know, we'll have certainly a, I hope, a ruling from
7 Judge McMahon before that hearing would --

8 THE COURT: That's fine. You can tell Ms. Li that
9 I agreed to that. And I don't know whether the school
10 district has that same issue or not. I guess they're not
11 really involved in the appeal process, so I guess they could
12 go forward on the --

13 MR. SHORE: Thank you, Your Honor.

14 THE COURT: -- on the other date.

15 Okay. All right. So hearing nothing more on the
16 pretrial conference, that concludes today's hearings.

17 (Whereupon these proceedings were concluded at
18 4:07 PM)

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I N D E X

RULINGS

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Motion to File Proof of Claim after Claims

Bar Date filed by Emanuel Thirkill

(ECF #3764) Granted 30 5

Motion to File Proof of Claim after Claims

Bar Date filed by Howard Adelglass

(ECF #3840) Denied 38 5

Motion to Allow/Letter - Derivative and

Fraudulent Conveyance filed by Ronald Bass,

Sr. (ECF #3619) Denied 48 2

Certification of Direct Appeal to Court of

Appeals / United States Trustees Memorandum

Of Law In Support Of Motion To Certify

Direct Appeal To The Court Of Appeals Under

28 U.S.C. § 158(d) [ECF No. 3868] Granted 50 9

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Joinder of Certain Canadian Municipality
and First Nations Creditors and Appellants,
in Support of the 5 Motions by the Office
of the United States Trustee and the
Appealing States for Certification of a
Consolidated and Expedited Direct Appeal
to the Court of Appeals for the Second
Circuit [ECF No. 3913] Denied

202 16

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: October 16, 2021

[& - 2005]

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